Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CLAUDE DAVID CONVISSER,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the New Mexico Supreme Court violated the First Amendment by imposing discipline on Mr. Convisser for this lawyer's petitioning and assisting others to petition the New Mexico government for redress of grievances, after disciplinary counsel requested to dismiss allegations of misconduct as baseless, but a reviewing officer vetoed this request and ordered charges to be filed expressly because of her objection to Mr. Convisser's petitioning, an objection the hearing committee subsequently adopted.

2. Whether New Mexico disciplinary counsel, who requested dismissal of allegations of misconduct, engaged in vindictive prosecution in violation of Mr. Convisser's right to due process under the Fourteenth Amendment when after proposing to dismiss, disciplinary counsel, based on the exact same set of facts, then requested disbarment because petitioning, in disciplinary counsel's words, is "certainly not the conduct we want to see in somebody admitted to practice law in New Mexico."

3. Whether the prosecution of Mr. Convisser violated the equal protection of the laws, in that the New Mexico Rules Governing Discipline establish a passive enforcement mechanism and disciplinary officials deliberately and unjustifiably selected him for prosecution

because of his exercise of the First Amendment right to petition.

4. Whether the New Mexico Supreme Court afforded Mr. Convisser adequate procedural due process before impairing his substantive due process rights to liberty and property vested in his New Mexico law license.

PARTIES TO THE PROCEEDING

The petitioner is Claude D. Convisser, who was attorney-respondent below. The caption contains the names of all the parties.

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Petitioner Claude D. Convisser ("Mr. Convisser") respectfully petitions for a writ of *certiorari* to review the order and judgment of respondent the Supreme Court of the State of New Mexico.

OPINIONS AND ORDERS BELOW

The order and judgment of the New Mexico Supreme Court disciplining Mr. Convisser for attorney misconduct (App. 1a) is unpublished, as are that Court's order denying his motions for rehearing and reconsideration (App. 45a); the disciplinary board panel's recommendations (App. 4a); the hearing committee's findings of fact, conclusions, and recommendations (App. 10a); and the reviewing officer's report. App. 25a.

JURISDICTION

The New Mexico Supreme Court entered its order and judgment disciplining Mr. Convisser on February 24, 2010. It denied Mr. Convisser's motion for rehearing by order dated March 23, 2010 (App. 45a). This Petition was filed within ninety days of entry of the denial of Mr. Convisser's motion for rehearing. This Court has jurisdiction under 28 U.S.C. 1257(a) and Supreme Court Rule 13(3).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in part: "Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances." The Fourteenth Amendment,

Section 1, states in part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article II, Section 14 of the New Mexico Constitution (App. 70a) and the New Mexico Rules that, as applied in this case, have a bearing on federal constitutional rights are printed in the appendix to this Petition (App. 70a-90a) and are excerpted in the text that follows.

STATEMENT OF THE CASE

The New Mexico Supreme Court's judgment against Mr. Convisser culminated a disciplinary proceeding in which officials at all stages below that Court expressly pressed charges to prevent Mr. Convisser from petitioning state government for redress of grievances and assisting others to do so, and in retaliation for his having engaged in such petitioning. In the words of disciplinary counsel, Mr. Convisser's petitioning was "certainly not the conduct we want to see in somebody admitted to practice law in New Mexico." App. 107a.

The grounds for discipline, which the New Mexico Supreme Court affirmed by the lowly standard of substantial evidence in the record, were pretextual and imposed in novel circumstances. They were driven in part by disciplinary counsel's switch from proposing to dismiss the allegations of misconduct at the close of

his investigation to seeking Mr. Convisser's disbarment on the cue of a disciplinary reviewing officer, who "more than anything else," disapproved of Mr. Convisser's petitioning. App. 43a.

In 2007, Mr. Convisser and other citizens organized the Rescue EcoVersity petition ("the petition") (App. 110a) under Article II, Section 14 of the New Mexico Constitution, which provides a civil cause of action for citizens collectively to petition a state district court to convene a grand jury. App. 70a. Exercise of this right includes the right to petition the state government for redress of grievances under the First Amendment to the United States Constitution. Mr. Convisser signed this petition and, in the face of intimidation which a target named in the petition directed to them,[1] he gave legal advice and assistance to other people to exercise these rights. The Rescue EcoVersity petition has broad support from an array of leading citizens[2] and it has received prominent press coverage in New Mexico.[3] Tab 20, exh. D.[4]

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[1]*See, e.g.*, App. 116a-119a, 129a-130a (in part, testimony of Tomas Enos, an organizer of the petition campaign, that he called Mr. Convisser in response to receiving a threatening letter from Mr. Harbour's counsel in 2008 and that Mr. Convisser provided him *pro bono* legal advice).

[2]Hearing exhibit ("exh.") HH, reverse side (public letter signed by twenty experts in permaculture and sustainable living).

[3]One thousand nine hundred fifty two (1,952) signatories, as confirmed by the Santa Fe County Clerk, filed the Rescue EcoVersity petition (App. 110a) on July 23, 2009. *In re. Rescue EcoVersity Petition*, N.M. 1st Jud. Dist. Ct. No. D-

Following initial news coverage, the person named in the petition as a target for grand jury investigation, Thomas J. "RP" "Jeff" Harbour ("Mr. Harbour"), filed allegations of misconduct against Mr. Convisser with the disciplinary board, an agency of the New Mexico Supreme Court. Upon completing a thorough, six-month investigation, deputy disciplinary counsel Joel L. Widman ("Mr. Widman") determined that there was not cause to file formal charges against Mr. Convisser. Pursuant to Rule 17-104(B) New Mexico Rules Annotated ("NMRA"). (App. 9-a), Mr. Widman elected to refer his proposed dismissal to a reviewing officer, who was a practicing attorney on a local disciplinary committee. App. 25a (reviewing officer's report: "You have asked me to review your proposed dismissal of the complaint filed by [Mr.] Harbour against [Mr.] Convisser" (emphasis added)).

Citing Mr. Convisser's petitioning for a grand jury (App. 43a), the reviewing officer vetoed disciplinary counsel's proposed dismissal and directed Mr. Widman to file charges. The hearing committee found against Mr. Convisser by a preponderance of the evidence. App. 19a, ¶ 25. Among other sanctions described herein, the hearing committee recommended restricting Mr. Convisser's future practice of law so that he could no longer assist others to advance the Rescue EcoVersity petition. New Mexico Supreme Court suspended Mr. Convisser from the practice of

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0101-CV-200902377 (petition denied Nov. 12, 2009; appeal pending, N.M. Ct. App. No. 30,100).

[4]All references to "tab" numbers appear in the disciplinary board pleading index, at App. 55a-61a.

law for one year but deferred this suspension subject to terms and conditions, including his payment of costs in the amount of $5,814.44. App. 1a-3a.

I But-for Prosecution of Mr. Convisser for Petitioning

In overruling Mr. Widman's requested dismissal of allegations of misconduct, the reviewing officer stated as her primary reason the following:

> Mr. Convisser's repeated attempts to have a grand jury summoned to investigate criminal fraud, or to have Mr. Harbour or other Board members removed from the Board, smacks of Mr. Harbour [sic] trying to carve out a legal role for himself when he does not represent anyone who has any standing to bring these claims. This, more than anything else, bothers me about the entire file.

App. 43a. Since Mr. Convisser's only "attempt[] to have a grand jury summoned to investigate criminal fraud" was his signing and assistance to other Rescue EcoVersity petitioners, this petition was *de facto* the subject of the reviewing officer's criticism.

The reviewing officer went on to state (App. 43a) that Mr. Convisser's involvement in the Rescue EcoVersity petition "is in violation of Rule 16-301" NMRA (meritorious claims and contentions) (App. 72a), but she declined to propose a charge on "th[is] basis" and none was ever brought. App. 62a-69a. Nor, despite her criticism of Mr. Convisser for "trying to carve out a legal role for himself," did the reviewing officer propose a disciplinary charge relating to improper solicitation of prospective clients, Rule 16-703 NMRA (App. 77a), and none was ever brought. App. 62a-69a. If these rationales for objecting to Mr. Convisser's petitioning for a grand jury were legitimate, Rule 17-309(B)(2) NMRA required the disciplinary charging authority to bring charges based on these New Mexico Rules of Professional Conduct, since Rule 17-309(B)(2) states: "The specification of charges shall contain [] the provisions of the Rules of Professional Conduct, court rule, statute or other law claimed to have been violated." App. 82a (emphasis added).[5]

Stripped of grounds for discipline that went uncharged, and therefore, must have been baseless, Mr. Convisser's petitioning was the reviewing officer's naked and primary motivation for her vetoing Mr.

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[5]The reviewing officer also substantially mis-read disciplinary counsel's investigative file and her report stated unjustified assumptions and conclusions in recommending these charges, as set forth in Mr. Convisser's second of eight motions to dismiss filed below. Tab 62A.

Widman's proposed dismissal.[6] Under Rule 17-104(B) NMRA, once disciplinary counsel makes a referral to a reviewing officer, this officer "shall have the ... duty to review, approve, modify or disapprove dismissals of complaints." App. 80a (emphasis added). Thus, disciplinary counsel, on pain of violating the reviewing officer's duty, was bound to proceed to charges and a formal hearing.

Without mentioning the Rescue EcoVersity petition, the specification of charges alleged that Mr. Convisser violated four of the Rules of Professional Conduct. App. 62a-69a. The hearing committee dismissed two of these Rules as a basis for discipline but found that Mr. Convisser had violated the other two: Rule 16-804(C) NMRA (misconduct involving dishonesty, fraud, deceit or misrepresentation) (App. 79a) and Rule 16-505(A) NMRA (unauthorized practice of law). App. 73a. The hearing committee found that Mr. Convisser did not act with a selfish motive or seek to profit personally from his conduct. App. 20a, ¶ 30.

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[6]Rule 17-104(B) NMRA requires that the identity of the reviewing officer remain concealed "at all times." App. 80a. Mr. Convisser never requested disclosure of her identity because disciplinary counsel inadvertently made this disclosure to him and her unconstitutional intent was so apparent in her report that he did not have any need to conduct discovery of her. The fact that her office (# 324) is directly opposite Paseo de Peralta road in Santa Fe from the office of Mr. Harbour's counsel Walter Melendres (# 325) is relevant, since Mr. Melendres aggressively sought to intimidate citizens from signing the Rescue EcoVersity petition and he wrote a long letter to disciplinary counsel supporting his client's bar complaint against Mr. Convisser. App. 94a, 117a-119a, 129a-130a, and 134a. *See supra* note 1.

In other words, he was assisting others *pro bono publico* to petition.[7]

The hearing committee recommended Mr. Convisser's indefinite suspension from the practice of law "until such time as he can show that he has met [two] conditions:"

> [1] he has completed a mental health evaluation by a psychologist [] as to his ability and fitness to practice law [and] obtained appropriate counseling, [and]
>
> [2] he shall not serve as an attorney in connection with [claims for alleged wrongdoing by Mr. Harbour or other officers of the two non-profits] but [he] may act as a private citizen.

App. 23a, ¶ 39.

The hearing committee's second condition effectively barred Mr. Convisser from assisting others to advance the Rescue EcoVersity petition, since the hearing committee knew from testimony that at the time of the disciplinary hearing, the petition was pending and Mr. Convisser was providing legal advice and assistance to other petitioners. *See supra* note 1; App. 116a-118a,133a-134a; 145a (petition then waiting to be filed in district court). The disciplinary board

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[7]*See* Rule 16-601 NMRA ("a lawyer should aspire to ... provide legal services ... at no fee ... to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights") (App. 75a).

panel eliminated the second recommendation stated above and fixed Mr. Convisser's suspension to a one-year fixed term, conditioned on a psychological evaluation as to his ability and fitness to practice law, followed by six months of supervised probation. This panel (App. 4a) affirmed in full the remainder of the hearing committee's findings, conclusions and recommendations that were imbued with the intent of the reviewing officer, the hearing committee, and disciplinary counsel to punish Mr. Convisser for his petitioning activity and prevent him from assisting others to petition.

II Discipline Based on Substantial Evidence in the Record

In announcing the decision of the New Mexico Supreme Court, then-Chief Justice Chavez stated, "[T]he Court concludes that having read the entire file, that the findings are supported by substantial evidence." (App. 98a). The findings, however, ignored many important facts that were admitted in evidence.

Of note was the testimony of Associate Dean of the Faculty of the University of New Mexico Law School and Professor of Law Laura Gomez. She had invited Mr. Convisser to teach professional responsibility at UNM Law School before the filing of allegations of misconduct against him. App. 130a-132a. She disputed that Mr. Convisser's conduct was unprofessional, testifying that in her view, he was still "supremely qualified" to teach professional ethics. App. 112A-113a; 131a. Mr. Convisser taught professional ethics CLE's to other lawyers in northern

Virginia for four years, including a seminar on the new Rules of Professional Conduct, which Virginia adopted in 1999 but New Mexico did not adopt until 2008. Transcript of hearing before the hearing committee, April 16-17, 2009 ("hearing tr."), at 334, line 19 -- 337, line 9; 343, line 9 -- 346, line 4.

III *Ex Parte* Communications Defaming Mr. Convisser's Mental Well-Being

The hearing committee, affirmed by the disciplinary board panel, concluded that Mr. Convisser exhibited "a total lack of understanding of his conduct and the consequences of his actions." App. 21a, ¶ 33. At oral argument before the New Mexico Supreme Court, then-Chief Justice Chavez stated to Mr. Widman, "You have to agree that [the finding of a lack of mental capacity] is an unwarranted finding, don't you?" App. 97a. The New Mexico Supreme Court did not require a mental health examination of Mr. Convisser. App. 98a.

Mr. Widman told the New Mexico Supreme Court, "There was no -- We didn't introduce evidence of his, of any mental illness." App. 96a. Mr. Widman stated, "I want to make it clear that we did not secretly request a mental health evaluation." *Id.* However, circumstances belie the latter representation of Mr. Widman. The New Mexico Rules Governing Discipline do not proscribe *ex parte* communications with the hearing committee or disciplinary board panel. In light of this laxity, there was strong reason and

evidence to doubt Mr. Widman's disavowal of such communications.

According to Dr. Janeen Maas, on the day of New Mexico Supreme Court oral argument, Mr. Widman published for all the world to hear non-privileged statements attributing to Mr. Convisser schizophrenia, delusions and mental impairment. Affidavit of Dr. Maas (exh. 1 to motion for reconsideration filed March 8, 2010). Dr. Maas is in a position to attest to Mr. Convisser's absolute mental competence because she knows him well and as a family medical doctor, she is qualified to make this kind of assessment. *Id.*

Disciplinary board panel member Carolyn Tinker strongly implied in comments at oral argument before that panel that it had already received *ex parte* communications attributing "mood swings like crazy" to Mr. Convisser. App. 107a-109a. Mr. Harbour, the complaining witness and prime target of the Rescue EcoVersity petition and any grand jury investigation to ensue, testified that he engaged in *ex parte* communications with the chairman of the hearing committee. Exh. 4 to tab 88. In retaliation for Mr. Convisser's advocacy of the Rescue EcoVersity petition, Mr. Harbour has spread false and defamatory rumors about him,[8] which Mr. Harbour undoubtedly related to Mr. Widman or the hearing committee chairman directly.

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[8]Tab 87, ¶ 6.

IV No New Evidence to Justify Switch from Dismissal to Disbarment

Mr. Convisser actively defended himself at all stages of the proceeding. See, e.g., App. 55a-61a (93 separate entries in disciplinary board pleading index). The two-day evidentiary hearing on April 16-17, 2009 did not turn up any additional evidence of alleged misconduct that disciplinary counsel was not already aware of when Mr. Widman proposed to the reviewing officer dismissal of the allegations of misconduct at the close of his investigation six months earlier. Yet Mr. Widman argued to the hearing committee: "Respondent's conduct in this matter demonstrates a fundamental dishonesty that is irremediable. It is therefore recommended that respondent be disbarred." Tab 75A, ¶ 28. Mr. Widman continued to insist on Mr. Convisser's disbarment before the disciplinary board panel (tab 92) and the New Mexico Supreme Court.

Mr. Convisser pointed out the vindictiveness of Mr. Widman's sentencing stance to both the disciplinary board panel (tab 89) and the New Mexico Supreme Court (brief filed Dec. 18, 2009) and requested dismissal on this ground, along with many others. Neither of these tribunals addressed this issue, much less directed Mr. Widman to answer the fundamental question, What new evidence turned up after you proposed dismissal that led you repeatedly to request disbarment? The only answer Mr. Widman can give is, "None."

V Pretextual Grounds for Discipline

The charges and findings that Mr. Convisser engaged in misrepresentation and the unauthorized practice of law pertained to his interactions with complaining witness Harbour, Marie Wilkinson and Sibyl Harwood in the year preceding Mr. Harbour's filing of the allegations of misconduct. The hearing committee's findings included conduct that was not stated in the specification of charges (App. 62a-69a): making a misrepresentation to disciplinary counsel, paragraph 19 (App. 15a-16a); incompetence, paragraph 6 (App. 12a); extortion, paragraph 17 (App. 15a); and failing to report misconduct of another attorney that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law, paragraph 23 (App. 18a). Since these additional charges first arose in disciplinary counsel's post-hearing proposed findings and conclusions (tab 75A), Mr. Convisser did not present a defense to them at the hearing. When he argued after the hearing that the new allegations and findings denied him fair notice (tab 79A), the hearing committee, citing an email exchange that is not in the record and that is in fact misconstrued in the findings, branded him with "bizarre and peculiar" behavior. App. 22a, ¶ 36.

As the Rescue EcoVersity petition (App. 110a-111a) alleges and as set forth in hearing exhibits C and 7, Frances Harwood established EcoVersity and endowed its sister institution Prajna Foundation (together, "the two non-profits") to teach sustainable living and permaculture to the people of northern New Mexico. Mr. Harbour, who was her tax preparer, and

his associates had her sign a new will six days before she died of cancer, while she was debilitated and on morphine. This will named Mr. Harbour personal representative of her estate, which he used as a springboard to take control of the two non-profits, to the benefit of himself and his associates and the detriment of the two non-profits and their intended beneficiaries, the people of northern New Mexico. Mr. Harbour closed EcoVersity as a hands-on teaching center and plundered its treasury, all contrary to the wishes of Frances Harwood. He has used some of its money to hire a well-connected law firm to defend himself.

Offered information by EcoVersity board member Ms. Wilkinson, Mr. Convisser investigated and found evidence of undue influence on the execution of Frances Harwood's will, a form of fraud. Mr. Convisser met with Mr. Harbour, with whom he was personally acquainted, on April 24, 2007 to ask informally for his resignation from the two non-profits. The misrepresentation charges arise (1) from whether Mr. Convisser ever told Mr. Harbour in this meeting that he was "representing a client" and (2) from an unsigned document that Mr. Convisser prepared giving the New Mexico Attorney General information provided by Ms. Wilkinson, the substance of which she disputed in her testimony at the hearing. Hearing exh. 11.

Mr. Convisser admitted, and the hearing committee found, that he made one mistake in his communications with Mr. Harbour and the New Mexico Attorney General: he mis-stated the statute of

limitations applying to a claim against Mr. Harbour for breach of fiduciary duty in his capacity as the personal representative of Frances Harwood's estate. App. 12a, ¶ 6. Mr. Convisser argued that he did not owe Mr. Harbour, who is an adverse party, or the New Mexico Attorney General, who is a law enforcement investigating and prosecuting agency, rather than a tribunal, a duty of professional competence[9] and therefore, his negligent mistake was excusable.

Mr. Convisser argued that if he could be said to have misrepresented anything Ms. Wilkinson told him, she perjured herself at the hearing, which he was unable to prove because the hearing committee denied him a fair opportunity to cross-examine her. Although the unsigned statement that Mr. Convisser prepared expressly declaimed in bold print that it was not a literal transliteration of Ms. Wilkinson's words and that she had never reviewed it, the hearing committee only permitted him to ask her whether she had spoken to him the precise words set forth in.[10] The hearing committee did not permit Mr. Convisser to impeach Ms. Wilkinson by cross-examining her on the fact that Mr. Harbour, who was sitting next to her at the hearing, intimidated her.[11]

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[9]*Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 122 (N.M. 1988).

[10]*See, e.g.*, App. 121a-128a (objections that Mr. Convisser being denied an opportunity to cross-examine and explore areas of impeachment).

[11]App. 121a (instruction from the hearing committee chair to re-phrase the question in terms of what Ms. Wilkinson

While looking into the EcoVersity matter, Mr. Convisser was licensed to practice law in Virginia and in good standing, but on inactive status there. Affidavits of Virginia State Bar officials ("VSB affidavits") (exhibits to motion for reconsideration filed March 8, 2010).[12] Mr. Convisser awaited the results of the New Mexico Bar examination and then his swearing-in to that Bar on April 27, 2007. When he realized that he may need to function as a lawyer before that date, he took twelve hours of continuing legal education credit to activate his Virginia license. He sent this documentation to the VSB, called on the telephone, and spoke to VSB MCLE Director Gale Cartwright on March 22, 2007. She informed him that the VSB had received his documentation that morning, everything appeared to be in order, and his Virginia license would be activated.[13]

Based on this conversation and reasonably believing that his Virginia license was then active, on the evening of March 22, 2007, Mr. Convisser sent at Sibyl Harwood's request[14] an unsigned, proposed

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had told Mr. Convisser, rather than whether she was in fact afraid of Mr. Harbour); 134a-137a..

[12]*Cf.* hearing committee's findings, ¶12 (App. 13a-14a) ("respondent falsely stated he was licensed and in good standing in Virginia"). The findings are replete with factual errors that are too numerous to cover in this petition.

[13]VSB affidavits; App. 115a-116a, 132a; hearing exh's L-1 and -2 (excluded from evidence).

[14]Sibyl Harwood is a sister of deceased testatrix and EcoVersity founder and benefactor Frances Harwood.

contract for legal services to her that expressly required both of their signatures to take effect. Hearing exh. 8. This transmission was the basis for the unauthorized practice of law charge.

The VSB informed Mr. Convisser by letter dated April 12, 2007 that his Virginia license was formally activated effective March 28, 2007, rather than March 22. Neither Sibyl Harwood nor Mr. Convisser ever entered into the draft contract for legal services by signing it. The proposed contract provided that Mr. Convisser review documents, which Sibyl Harwood never sent him. Hearing exh. 8. He never performed any legal services pursuant to it.

VI Denial of Exculpatory and Relevant Evidence

Despite Mr. Convisser's demonstrating good cause, Rule 17-311 NMRA (App. 84a), and his having no other way to discover facts, including exculpatory evidence, known to disciplinary counsel's witnesses who refrained from communicating with him, the hearing committee denied all of Mr. Convisser's requests for written discovery, including, specifically, exculpatory evidence known to disciplinary counsel. Tabs 16, 20-22, 39, 44, and 66. Mr. Convisser moved repeatedly[16] to discover information that Mr. Widman gleaned from his interviews of Sibyl Harwood (App. 115a), who resides in Massachusetts, pertaining to the unauthorized practice of law charge, but the hearing

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[16]Tabs 21, 22 and 44.

committee denied all these motions. Tabs 39 and 66.[16] Though Mr. Widman listed her as a witness (App. 68a), for reasons known only to him, he did not call her as a witness at the hearing. Mr. Convisser was deprived of the benefit of her testimony potentially corroborating his own and exonerating him of one of the charges.

There was strong circumstantial evidence, based on deposition testimony by Mr. Harbour's counsel, that Mr. Widman secreted from his allegedly "open" casefile potentially exculpatory documents that Mr. Convisser specifically requested. Tab 17; tab 77, at 7-9. These documents, apparently furnished by Mr. Harbour's counsel, were notes of EcoVersity board of director meetings that may have shed light on Mr. Harbour's account of his April 24, 2007 meeting with Mr. Convisser that gave rise to the misrepresentation charge.

A protective order entered at disciplinary counsel's request and over Mr. Convisser's objection[17] prevented Mr. Convisser from introducing evidence of complaining witness Harbour's fraud, either on cross-examination or in Mr. Convisser's case-in-chief. Hog-

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[16]Sibyl Harwood terminated communications with Mr. Convisser in 2007 when he informed her that he had learned that Mr. Harbour, as personal representative of the estate of her sister Frances, had allowed her family members to keep a Picasso painting that rightfully belonged to the residual beneficiary of Frances's estate, EcoVersity. Hearing tr., at 365, line 17 -- 367, line 10; 371, line 11 -- 380, line 6; 428, lines 2-6.

[17]App. 50a-54a; tab 33, at 10 (objection); tab 41 (order extending protective order to govern hearing).

tied, Mr. Convisser was effectively disabled from challenging Mr. Harbour's credibility. As a result, the hearing committee believed Mr. Harbour's account of their verbal conversation on April 24, 2007 over Mr. Convisser's.

VII All Federal Constitutional Questions Raised Below

Mr. Convisser repeatedly raised all questions under the United States Constitution set forth in this Petition in the state proceeding below.[18] The hearing committee ignored or denied all of the motions of Mr. Convisser premised on constitutional grounds without requiring disciplinary counsel to respond. Tabs 35, 53, and 78. The only time disciplinary counsel ever responded to any of Mr. Convisser's federal constitutional arguments was during oral argument before the disciplinary board panel, when he addressed a part of Mr. Convisser's selective prosecution and prosecutorial misconduct motions. App. 101a-106a. In the first sentence of its recommendations, this panel, without giving any explanation, denied Mr. Convisser's motion to dismiss based on these grounds and the additional ground of vindictive prosecution. App. 4a-5a. The New Mexico Supreme Court did not address any of the foregoing federal constitutional issues, all raised by Mr. Convisser before it.

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[18]Tabs 23, 45, 62A, 68, 76, 77, and 89; brief filed Dec. 18, 2009; motion for reconsideration filed March 8, 2010.

REASONS FOR GRANTING THE WRIT

The New Mexico Supreme Court has decided important, novel federal constitutional questions in a way that should be decided by this Court and that conflict with relevant decisions of this Court. Supreme Court Rule 10(c); *Konigsburg v. State Bar of Cal.*, 353 U.S. 252, 254 (1957).

I The New Mexico Supreme Court's Disciplining Mr. Convisser For His Petitioning and Assisting Others to Petition the State Government for Redress of Grievances Violated the First and Fourteenth Amendments.

A state:

> has broad powers to regulate the practice of law within its borders; but [this Court has] had occasion in the past to recognize that in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution. [cites omitted]
>
> * * *
>
> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the

> right of individuals and the public to be fairly represented in lawsuits authorized [] to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, [cite omitted] and for them to associate together to help one another to preserve and enforce rights granted them [] cannot be condemned as a threat to legal ethics.

Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 6-7, (1964). Although the First Amendment's Petition Clause "unambiguously refer[s] to individual rights, not 'collective' rights," *District of Columbia v. Heller*, ___ U.S. ___, ___, 128 S. Ct. 2783, 2790 (2008), "[t]he First Amendment would [] be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).[19]

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[19]The First Amendment right to petition is incorporated into the Fourteenth Amendment via the due process clause and is thereby applicable to the states. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

"[A]ll citizens, regardless of the content of their ideas, have the right to petition their government." *City of Cuyahoga Falls, Ohio v. Buckeye Cmty Hope Found.*, 538 U.S. 188, 196 (2003). "'[T]he right of access to the courts is an aspect of the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). Access to the courts is "a fundamental constitutional right." *Lewis v. Casey*, 518 U.S. 343, 346 (1996). However, as in this case, citizens may be intimidated from exercising this fundamental right without the assistance of counsel.

In this case:

> The litigation in question [may not be] bound up with political matters of acute social moment, [] but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are

> not confined to any field of
> human interest.'

United Mine Workers, 389 U.S. at 223 (cite omitted). "[O]ur prior cases [] have protected petitioning whenever it is genuine, not simply when it triumphs." *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 532 (2002). "Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force." Id., 536 at 532 (citing Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims)).

Every federal anti-discrimination statute has its own standards for proving unconstitutional intent. *Gross v. FBL Fin. Serv's, Inc.*, ___ U.S. ___, 129 S.Ct. 2343 (2009). There is no doubt that Mr. Convisser would have avoided disciplinary charges had not two events happened: (1) disciplinary counsel elected to refer the results of his investigation exonerating Mr. Convisser to a reviewing officer and (2) the reviewing officer overruled his proposed dismissal expressly because "more than anything else," his petitioning "bother[ed]" her. App. 43a. The hearing committee evidenced the same unconstitutional intent to discriminate against Mr. Convisser for assisting others to petition when it recommended that his future practice of law be conditioned, in effect, on ceasing his legal counsel to the Rescue EcoVersity petitioners. Disciplinary counsel showed the same colors in his argument to the disciplinary board panel.

In sum, discriminatory intent against petitioning directly and centrally motivated the initiation of charges rooted in pretext against Mr. Convisser and informed the entirety of the hearing findings ultimately adopted by the New Mexico Supreme Court. These facts compel reversal of the discipline against Mr. Convisser. "The right to petition the courts cannot be so handicapped." *Brotherhood of R. R. Trainmen*, 377 U.S. at 7.

II New Mexico Disciplinary Counsel Engaged in Vindictive Prosecution, and Thus Violated Mr. Convisser's Right to Due Process Guaranteed by the Fourteenth Amendment, When He Requested Disbarment on Exactly the Same Set of Facts as He Had Earlier Proposed Dismissal.

Lawyer disciplinary proceedings are "adversary proceedings of a quasi-criminal nature," *In re. Ruffalo*, 390 U.S 544, 551 (1968), thereby conferring on the attorney-respondent constitutional rights accorded criminal defendants. *See, e.g., Spevack v. Klein*, 385 U.S. 511 (1967) (privilege against self-incrimination).

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (internal citations and quotation marks omitted). "In determining whether

the government has engaged in prosecutorial vindictiveness, th[e] court must determine whether the prosecution engaged in conduct that would not have occurred but for the prosecution's desire to punish the defendant for exercising a specific legal right." *United States v. Sarracino*, 340 F.3d 1148, 1178 (10th Cir. 2003), *cert. denied* 540 U.S. 1131 (2004) (citing *United States v. Contreras*, 108 F.3d 1255, 1262 (10th Cir. 1997)).

"A defendant [asserting vindictive prosecution] has the burden of proof and must establish either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." *United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991) (citing *United States v. Goodwin*, 457 U.S. 368, 374, 376, 380-81, 384 & n. 19 (1982); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969); *United States v. Doran*, 882 F.2d 1511, 1519, 1521 (10th Cir. 1989)). "Thereafter, the burden shifts to the prosecution to justify its decision with legitimate, articulable, objective reasons." *Raymer*, 941 F.2d at 1040 (citing *Goodwin*, 457 U.S. at 374; *Pearce*, 395 U.S. at 726).

In this case, actual or presumptive vindictiveness lies in the prosecutor Mr. Widman's repeated advocacy for Mr. Convisser's disbarment on the exact same set of facts on which he proposed dismissal to the reviewing officer. There are two apparent reasons why disciplinary counsel behaved vindictively. First, the reviewing officer, hearing committee, and Mr. Widman himself all expressed disapproval of Mr. Convisser's petitioning. Second, Mr.

Convisser put Mr. Widman through his paces every step of the way by defending himself actively.

Mr. Widman never offered a rebuttal to the presumption of vindictiveness. *Raymer*, 941 F.2d at 1040. Therefore, reversal of the discipline and dismissal are compelled.

III The Prosecution of Mr. Convisser Was Selective, Based Unjustifiably on the Exercise of Constitutional Rights, in Violation of the Equal Protection of the Laws.

A selective prosecution defense is governed by "ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). The defendant must "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* The decision to prosecute may not be "'deliberately based upon an unjustifiable standard'" such as "the exercise of constitutional rights." *Id.* (cites omitted). "A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

Rule 17-307(B) NMRA governs whether New Mexico disciplinary counsel will bring charges in response to the filing of a complaint. It states:

> Disposition prior to formal investigation. If the complaint does not set forth allegations which if true state reasonable cause to believe that a respondent-attorney has violated the Rules of Professional Conduct, a disciplinary counsel staff attorney may dismiss the complaint, provided that all doubts shall be resolved in favor of conducting a formal hearing.

Rule 17-307(B) NMRA (App. 81a). This Rule is unconstitutional, both on its face and as applied in this case.

While the main clause requires a threshold of "reasonable cause" for the filing of charges and a formal hearing, the proviso creates a mandatory exception that negates the main clause: if there are any doubts, a formal hearing shall ensue. Rule 17-307(B) NMRA cannot possibly be applied to effect without either there being (a) formal charges and hearings for nearly every complaint filed, which is far from the case in reality, or (b) arbitrary and capricious enforcement in violation of the language of the Rule itself.

As the New Mexico Supreme Court has recognized, since "the law is not always clear and is

never static[], in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Rule 16-301 NMRA, Committee Commentary, paragraph 1 (adopted by N.M. Supreme Court order No. 08-8300-29) (App. 72a). Our adversarial system of justice requires lawyers to advance opposing notions of the law and the facts, the outcome of which lawyers cannot foretell and must await decision by a court. Lawyers often conduct themselves in a grey area. If disciplinary counsel applied Rule 17-307(B) NMRA (App. 81a) consistently, however, the common existence of an iota of doubt concerning the propriety of a lawyer's conduct would lead to the rigors of a formal hearing in response to the filing of most, if not all, allegations of misconduct.

The fact that the vast majority of complaints do not result in a formal hearing raises questions about the enforcement of Rule 17-307(B) NMRA and indicates that New Mexico disciplinary counsel exercises discretion in deciding which complaints to take to a hearing and which ones to dismiss along the way. This discretion, being a violation of the mandate of the Rule to proceed to a formal hearing in case of any doubt, is by definition, arbitrary, capricious, and subject to whimsical prejudice. Rule 17-307(B) NMRA is unconstitutional on its face, since selective enforcement of its mandate by definition subjects an attorney-respondent to unequal protection of the laws in violation of the Fourteenth Amendment.[20]

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[20]The concealment, as required by Rule 17-104(B) NMRA (App. 80a), of the identity of the reviewing officer, who in this case was the instigator of charges that disciplinary

Rule 17-307(B) NMRA is also unconstitutional as applied in the case of Mr. Convisser. App. 81a. In practice, it establishes a "passive enforcement system" that only rarely results in a formal disciplinary hearing in response to the filing of a complaint. *Wayte*, 470 U.S. at 608. The fact that Mr. Convisser was singled out for formal prosecution was, as set forth above, due to his exercise and assistance to others to exercise the First Amendment right to petition. The deliberate prosecution of Mr. Convisser for exercise of constitutional rights violated his right to equal protection of the laws under the Fourteenth Amendment. *Wayte*, 470 U.S. at 608.

Dixon v. District of Columbia was a selective prosecution resembling the instant case. 394 F.2d 966 (1968). The defendant was charged with a traffic infraction, which the prosecutor *nolle prosecuted*. The defendant then petitioned for a redress of grievances by filing a complaint about the police's conduct towards him. As a result, the prosecutor re-filed the charge, which the United States Court of Appeals for the District of Columbia Circuit dismissed as being impermissible because it was based on the defendant's exercise of his constitutional rights to petition and engage in free speech. *Id.* Similarly, in the case at bar, the prosecutor Mr. Widman proposed to dismiss but the reviewing officer overruled him with Mr.

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counsel originally considered meritless, further cloaks the prosecutorial decision-making of the New Mexico disciplinary authority in unaccountability and eases the path to selective prejudice. *See supra* note 6.

Convisser's constitutionally-protected petitioning expressly at the forefront of her mind.

In *United States v. Falk*, the defendant, who was vocally assisting others to resist the draft, was charged with and convicted of destroying his draft card. 479 F.2d 616 (7th Cir. 1973). He presented evidence that 25,000 draftees before him had destroyed their draft cards without sanction. Lacking direct evidence that his prosecution was due to his advocacy of draft resistance, the United States Court of Appeals for the Seventh Circuit nonetheless reversed the conviction based on the circumstantial evidence that the prosecutor charged this particular defendant because of his exercise of free speech. *Id.*

In Mr. Convisser's case, despite the standard of Rule 17-307(B) NMRA (App. 81a), New Mexico disciplinary counsel does not prosecute the vast majority of other lawyers facing allegations of misconduct. The unconstitutional criterion by which Mr. Convisser was selected for prosecution is even more obvious than in *Falk* because of the direct evidence lying in the reviewing officer's report, the hearing committee's recommendation conditioning Mr. Convisser's future practice of law on his not assisting others to petition, and the prosecutor's argument to the disciplinary board panel.

As the *Falk* defendant was the first person prosecuted under the draft card statute, a circumstance that court found suspect, the New Mexico Supreme Court trod new ground by imposing discipline on Mr. Convisser, no matter how his conduct is

characterized. That Court has never imposed discipline for an attorney's negligent misrepresentation to an adverse party, such as Mr. Harbour, to whom Mr. Convisser did not owe a professional duty. *See Garcia*, 750 P.2d at 122 (declining "to jeopardize the integrity of the adversarial system by imposing a professional duty on an attorney towards an adverse party"); *In the Matter of Bristol*, 142 P.3d 905, 910 (N.M. 2006) (distinguishing fraud, dishonesty and misrepresentation from negligent conduct).

More than the simple preponderance of the evidence found by the hearing committee (App. 19a, ¶ 25), the New Mexico Supreme Court has, in the past, always required proof by clear and convincing evidence to find misrepresentation in breach of Rule 16-804(C) NMRA (App. 79a). *Bristol*, 142 P.3d at 910 (classifying lawyer misrepresentation with dishonesty and fraud); *In the Matter of D'Angelo*, 733 P.2d 360 (N.M. 1987) (clear and convincing evidence required to prove allegations of fraud). Similarly, the New Mexico Supreme Court has never found an intentional violation of Rule 16-804(C) NMRA based solely on an attorney's verbal communication to an adverse party, such as Mr. Harbour, or on his voluntarily providing information to assist a governmental investigative agency, such as the New Mexico Attorney General.

Nor has that Court reported disciplining an attorney for engaging in the unauthorized practice of law under circumstances anywhere close to the one at bar. In sum, the New Mexico Supreme Court, like the lower courts in *Dixon* and *Falk* who were reversed on appeal, has singled out Mr. Convisser for sanction

under a novel application of standards that it has never applied to any other attorney before.

IV The New Mexico Supreme Court Impaired Mr. Convisser's Substantive Due Process Rights to Liberty and Property Vested in His Law License Without Affording Him Adequate Procedural Due Process.

A law license is both a liberty and a property interest whose impairment is protected by the due process clause of the Fourteenth Amendment. *Conn v. Gabbert*, 526 U.S. 286, 291-93 (1999) (recognizing in previous caselaw of this Court a Fourteenth Amendment liberty interest in and right "to practic[ing] one's calling," but denying it in the circumstances of that case); *Konigsberg*, 353 U.S. 252. "A license to practice law [] is a conditional privilege, revocable for cause." Preface, New Mexico Rules Governing Discipline (App. 85a). A bar disciplinary proceeding entitles the attorney-respondent to procedural due process, the question being "whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.'" *Ruffalo*, 390 U.S at 550 (cite omitted). The fundamental due process requirement of an opportunity to be heard "must be granted ... in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). For a host of reasons, the New Mexico Supreme Court denied Mr. Convisser a meaningful hearing in his disbarment proceeding.

A. When Unconstitutional Intent Influenced the Findings, the New Mexico Supreme Court Deprived Mr. Convisser of Due Process in Upholding, Based on the Appellate Standard of "Substantial Support in the Evidence," Findings Against Him That He Had Committed a Disciplinary Infraction by the Preponderance of the Evidence.

In deferring to the hearing committee as the finder-of-fact and upholding its findings as being supported by substantial evidence in the record,[21] the New Mexico Supreme Court failed to take into account the corrupting fact that multi-faceted and multi-layered unconstitutional intent and actions motivated and permeated the entire proceeding below it. Unconditional adherence to a substantial evidence in the record appellate standard compounded the hazard of employing a standard of proof by preponderance of the evidence, which standard is contrary to practice in federal court[22] and the majority of the states in lawyer disciplinary proceedings.[23] *Cf. D'Angelo*, 733 P.2d 360

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[21] *Cf. Bristol*, 142 P.3d at 910 (N.M. 2006) (standard of appellate review is substantial evidence in the record) *with In re. Levine*, 847 P.2d 1093, 1096 (Ariz. 1993) (state supreme court is "independent trier of both fact and law").

[22] *See, e.g., In re. Medrano*, 956 F.2d 101 (5th Cir. 1992) (clear and convincing standard applied in federal disbarment proceeding).

[23] *See, e.g., Disciplinary Matter Involving Walton*, 676 P.2d 1078, 1090, n. 3 (Alaska 1983) (dissent referring to at least

(N.M. 1987) (preponderance of the evidence applies to lawyer disciplinary proceedings not involving allegations of fraud) *with* Rule 18(C), ABA Model Rules for Lawyer Disciplinary Enforcement (clear and convincing evidentiary standard applies to all disciplinary infractions).

While preponderance of the evidence is suitable for administrative proceedings involving state regulated professions in which misconduct is inherently more black and white, such as medicine, accounting, nursing, dentistry and the electrical trade, preponderance of the evidence fails to take into account the ambiguity inherent in the practice of law that uniquely distinguishes the legal profession. Double use in this case of review by substantial evidence in the record, based on the trier-of-fact's finding of a disciplinary infraction by a preponderance of the evidence, raises the prospect that discipline was actually imposed on less than a preponderance of the facts.

Regardless of whether Mr. Convisser actually committed a disciplinary infraction, which he did not do, unconstitutional intent corrupted the findings, conclusions and recommendations of not only the reviewing officer and the hearing committee, but also the disciplinary board panel and New Mexico Supreme Court who relied on and adopted them. "[T]here is not enough in this record to support the charge and the findings growing out of" Mr. Convisser's petitioning. *In*

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31 states and D.C. who apply the clear and convincing standard to all disciplinary charges).

re Sawyer, 360 U.S. 622, 647 (1959) (Stewart concurrence) (reversal of state supreme court's disciplining of lawyer motivated by his exercise of free speech).

"Notwithstanding 'the state's civil labels and good intentions,' [t]his Court has mandated an intermediate standard of proof -- 'clear and convincing evidence' -- when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (intermediate standard applies in parental rights termination) (quoting from *Addington v. Texas*, 441 U.S. 418, 425-27 (civil commitment) and applying the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what process is due under the Fourteenth Amendment[24]). The individual must be threatened with "a significant deprivation of liberty" or "stigma." *Santosky*, 455 U.S. at 757 (quoting from *Addington*, 441 U.S. at 425, 426). *See also Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v.*

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[24]These three factors are:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

United States, 364 U.S. 350, 353 (1960) (denaturalization).

A lawyer disbarment proceeding threatens a loss of liberty and a stigma far exceeding the "mere loss of money." *Santosky*, 455 U.S. at 756. In a profession that places a premium on honest conduct and the practitioner's credibility, lawyer discipline can have far-reaching, devastating consequences, even if it falls short of disbarment.

The abnormality of New Mexico's use of the preponderance of the evidence standard of proof poses an additional burden on Mr. Convisser, who must report discipline he receives there to the other states in which he is licensed. *See, e.g.*, Virginia Rules of Professional Conduct, Rule 8.3(e)(1) (App. 88a). Virginia and the District of Columbia, in which Mr. Convisser is also licensed, both employ a clear and convincing standard. Virginia Supreme Court Rules for Disciplining, Suspending and Disbarring Attorneys, Section 13-18(L) (App. 89a); D.C. Court of Appeals, Board on Professional Responsibility, Rule 11.5 (App. 87a). These jurisdictions will either decide to impose reciprocal discipline on Mr. Convisser, even though the hearing committee made findings of a violation by only a preponderance of the evidence (App. 19a, ¶ 25), or subject him to a hearing *de novo* because the New Mexico committee was not required to reach the question of whether there was sufficient evidence of Mr. Convisser's misconduct to meet their higher standard of proof. This situation is illogical.

B. The Inclusion of Findings of Misconduct Which Mr. Convisser Did Not Receive Notice of Violated His Right to Due Process.

Due process in a lawyer disciplinary proceeding includes "fair notice of the charge." *Ruffalo*, 390 U.S at 550. *See also* Rule 17-309(B)(2) NMRA (requiring all charges to be stated to the attorney-respondent at the outset) (App. 82a). Disciplinary charges "become a trap when, after they are underway, [they] are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." 390 U.S at 551. Paragraph 19 of the hearing committee findings (App. 15a-16a) tags Mr. Convisser with making misrepresentations to disciplinary counsel via a pre-hearing letter he wrote to disciplinary counsel. Disciplinary counsel never provided notice before or during the hearing that any of his communications with that office constituted misconduct. Similarly, paragraphs 6, 17, and 23 (App. 12a-18a) pertain to alleged conduct that was not mentioned in the charges, but that arose as a result of disciplinary counsel's post-hearing proposed findings.

Since then-Chief Justice Chavez stated that that Court was disciplining Mr. Convisser based on the "entire file" (App. 98a) and Mr. Convisser was never given notice and, therefore, a chance to address these allegations at the hearing, he suffered prejudice and a violation of his right to due process due to their incorporation into the findings.

C. New Mexico's Allowance and the Occurrence of *Ex Parte* Communications With Disciplinary Officers in this Case Violated Mr. Convisser's Right to Due Process.

A fair hearing includes *de novo* consideration by an impartial adjudicator. *Concrete Pipe and Products of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 625 (1993). We would like to think that judges and juries could sort through scandalous misinformation and set it aside, but the ordinary rule against *ex parte* communications exists for a reason. *Ex parte* communications turn a judicial or administrative proceeding into an extra-judicial one because they introduce the judge or trier-of-fact to arguments and evidence behind the back of one party that he does not have a chance to rebut since he is unaware of their existence and contents. A prohibition on *ex parte* communications, like a higher standard of proof, is more justified in lawyer disciplinary proceedings than other administrative hearings because the subject matter in which lawyers operate involves more shades of grey, as compared to other professionals.

Consistent with the practice in other states, Rule 4(D)(1) of the ABA Model Rules for Lawyer Disciplinary Enforcement prohibits *ex parte* communications to the point of making a violation of such prohibition grounds for judicial and lawyer discipline. App. 90a. The New Mexico Rules Governing Discipline do not prohibit such communications. In this case, the hearing committee,

backed by the disciplinary board panel, determined that Mr. Convisser was legally incompetent and in need of a psychological evaluation. App. 21a, ¶ 33; 23a, ¶ 39. However, as Chief Justice Chavez stated twice, this conclusion was not supported by any evidence in the record. App. 97a, 98a. Nonetheless, there is compelling evidence that *ex parte* communications defaming Mr. Convisser's mental competence took place and unfairly turned the proceeding against him. The harm that such communications inflict on the impartiality of the adjudicators and the fairness of the hearing is incalculable.

D. Prosecutorial Misconduct and Restrictions on the Scope of Evidence Denied Mr. Convisser Potentially Exculpatory Evidence and Eviscerated His Defense

A federal court may overturn a conviction resulting from state trial if trial error "violated some right which was guaranteed [] by the Fourteenth Amendment." *Donnelly v. DeCritstoforo*, 416 U.S. 637, 642-43 (1974). "Egregious misconduct" by the prosecutor, such as concealing potentially exculpatory evidence, "amount[s] to a denial of constitutional due process." Id., 416 U.S. at 647 (citing *Brady v. Maryland*, 373 U.S. 83 (1973); *Miller v. Pate*, 386 U.S. 1 (1967)). Rule 17-309(C)(3) NMRA states that "[T]he respondent-attorney has the right to be represented by counsel, to appear at all hearings, to confront and cross-examine the witnesses and to present relevant evidence in the respondent-attorney's own behalf." App. 82a. The New Mexico Supreme Court has stated

that "the purpose of the rules [of professional conduct] can be subverted when they are invoked by opposing parties as procedural weapons." Scope, Rules of Professional Conduct (App. 86a).

The hearing committee denied Mr. Convisser's specific requests for exculpatory documents, some of which Mr. Widman appears to have secreted from his allegedly "open" casefile, and for Mr. Widman's account of his interviews of key witness Sibyl Harwood. The protective order entered at disciplinary counsel's request and over Mr. Convisser's objection crippled Mr. Convisser's depositions, disabled him from confronting and impeaching adverse party Harbour and witness Wilkinson at the hearing, and prevented him from presenting evidence on whole subject areas that were relevant to the charges and Mr. Convisser's defenses. These actions denied him due process.

CONCLUSION

For the foregoing reasons, Mr. Convisser requests that this Court issue a writ of *certiorari* to review the judgment of the New Mexico Supreme Court.

Respectfully submitted,

Claude D. Convisser
Attorney at Law
P.O. Box 6397
Santa Fe, New Mexico 87502
505-989-9743
cdconvisser@erols.com

Pro Se

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

February 24, 2010

NO. 32,019

IN THE MATTER OF CLAUDE DAVID CONVISSER, ESQUIRE

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

ORDER

WHEREAS, this matter came on for consideration upon recommendation of the Disciplinary Board, response thereto containing respondent's notice of issues raised on appeal, respondent's substitute brief, disciplinary counsel's brief, respondent's reply brief, and oral argument by the parties, Joel L. Widman on behalf of the Disciplinary Board, and Claude David Convisser on his own behalf, and the Court having considered said pleadings and oral argument and being sufficiently [sic], Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW THEREFORE, IT IS ORDERED that respondent hereby is SUSPENDED for one year pursuant to Rule 17-206(A)(2) NMRA;

IT IS FURTHER ORDERED that the entire period of suspension hereby is DEFERRED so long as the following terms and conditions are satisfied:

1. Respondent shall observe and comply with all Rules of Professional Conduct and Rules Governing Discipline; and

2. Respondent shall respond in a prompt and timely manner to any complaints filed with the Disciplinary Board and to any requests from disciplinary counsel for additional information.

IT IS FURTHER ORDERED that respondent shall pay costs in the amount of $5,814.44 on or before May 25 2010. Any unpaid balance as of this date shall accrue interest at the annual rate of eight and three fourths percent (8 ¾%).

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of February 2010.

(SEAL) _____/s/_____

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

APPENDIX B

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
OF THE STATE OF NEW MEXICO

In the Matter of

CLAUDE D. CONVISSER

No. 12-2008-559

An Attorney Licensed to
Practice Before the Court of
the State of New Mexico

BOARD PANEL RECOMMENDATIONS

The Board Panel having reviewed the record and having held oral argument on September 11, 2009 recommends that the Hearing Committee's Findings of Fact, Conclusions and Recommends be modified as follows and adopted as this Court's order:

1. The following paragraph be added to the final order of the Court:

"The Board Panel denied Respondent-Attorney Claude D. Convisser's Motion to Supplement the Record and Respondent-Attorney Claude D. Convisser's Motion to Dismiss Based on Selective Prosecution, Vindictive Prosecution, and Prosecutorial

Misconduct which were filed while the matter was pending before the Board Panel."

2. Recommendation Paragraph 39 should be modified as follows:

"39. It is therefore recommended that:

a. Respondent be suspended from the practice of law pursuant to Rule 17-206(A)(3) NMRA for one (1) year. During the one-year suspension, Respondent should be required to:

i. Obtain a mental health evaluation from a licensed psychologist as to his ability and fitness to practice law. The Disciplinary Board Chairman should select the psychologist.

ii. Provide the psychologist with a copy of the final order containing the Court's Findings of Fact, Conclusions and Recommendations prior to the evaluation;

iii. Assure that psychologist provides disciplinary counsel with a report regarding his/her evaluation;

iv. Obtain appropriate counseling, if recommended by the psychologist; and

v. Provide proof of completion of the same to disciplinary counsel as he completes each step.

b. Following his one-year suspension, Respondent be placed on supervised probation for a period of six (6) months pursuant to Rule 17-296(B)(2) NMRA. During his suspension, Respondent should be required to:

i. Observe and comply with all Rules of Professional Conduct and Rules Governing Discipline.

ii. Respond in a prompt and timely manner to complaints filed with the Disciplinary Board along with requests from disciplinary counsel for additional information.

iii. Be supervised by a licensed New Mexico Attorney ("Supervising Attorney") selected by the Chairman of the Disciplinary Board.

iv. Meet with the Supervising Attorney each time the Supervising Attorney requires him to do so, at least on a monthly basis, so that the Supervising Attorney can oversee Respondent's practice.

v. Give the Supervising Attorney full access to his case files and any other documents needed by the Supervising Attorney to oversee Respondent's practice.

vi. Assure that his Supervising Attorney timely submits a report to the office of disciplinary counsel at least two weeks before the probationary period is scheduled to end.

vii. Reimburse the Supervising Attorney at a rate to be determined by the Respondent and Supervising Attorney, plus gross receipts tax, for the time that the Supervising Attorney spends working with Respondent;

c. Within thirty (30) days of completion of his one-year period of supervised probation, Respondent should be required to seek reinstatement to non-probationary status pursuant to Rule 17-214(H) NMRA.

d. Respondent should be reinstated to non-probationary status only upon demonstrating that all of the terms and conditions of his probation have been satisfied.

c. In the event that Respondent violates any of the terms and conditions set forth above during his probationary period, disciplinary counsel shall bring the violation to the attention of the Supreme Court pursuant to disciplinary counsel's duties under Rule 17-206(G) NMRA and that, if Respondent is found in contempt of that Court, he may be fined, censured, suspended, disbarred and/or have his period of probation extended or revoked.

3. Paragraph 40 should be modified to read as follows:

"Pursuant to Rule 17-106(B) NMRA, Respondent should pay the costs of this proceeding within ninety (90) days of the date the Supreme Court issues its order relating hereto."

Respectfully submitted by:

/s/
Sandra E. Rotruck
Board Panel Chair

/s/
Steven L. Gonzales
Board Panel Member

/s/
Carolyn R. Tinker
Board Panel Member

APPENDIX C

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

CLAUDE D. CONVISSER, ESQ.

Disciplinary No. 12-2008-559

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

HEARING COMMITTEE'S FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS

The Hearing Committee held a hearing in this matter on April 16 and 17, 2009 in Santa Fe, New Mexico and, pursuant to Rule 17-313(E) NMRA, makes the following findings of fact, conclusions and recommendations.

FINDINGS OF FACT

1. Claude D. Convisser, Esq., (hereinafter "Respondent") is an attorney licensed to practice law

before the courts of the State of New Mexico and the Commonwealth of Virginia.

2. The factual allegations set forth in the Specification of Charges set forth acts of professional misconduct by Respondent in violation of Rules 16-505(A), 16-804(C) and 16-804(H) NMRA.

3. This matter arises out of a dispute between Respondent, a former student at EcoVersity, and certain board members of EcoVersity, Prajna Foundation and Jeff Harbour ("Harbour"), a board member and officer of EcoVersity and Prajna, over the manner in which EcoVersity has been operated. The dispute also involved matters related to a probate proceeding as well as alleged misconduct by Harbour and others.

4. The Hearing Committee makes no findings as to whether there was wrongdoing in the operation of the entities, the conduct of Harbour, the execution of Frances Harwood's will or other related matters. The sole focus is the professional conduct of Respondent in connection with the charges against him.

5. Frances Harwood ("Harwood") was the founder and the benefactor of EcoVersity and Prajna, which funds a portion of EcoVersity's operations. Harwood died in 2003. Harbour was the court-appointed personal representative of the Harwood probate.

6. On April 25, 2007, Harbour met with Respondent at Respondent's request. Prior to the meeting, Respondent had obtained a copy of the entire Harwood probate file and spent a substantial amount of time reviewing its contents. As a result of the review, Respondent should have known that the estate was properly closed and that the statute of limitations for actions against the personal representative had expired.

7. In the course of the meeting, Respondent stated that the probate proceedings pertaining to the estate of Frances Harwood had not been properly closed, the will could still be challenged, the statute of limitations for actions against Harbour as personal representative had not expired and that it appeared that the will was procured through the undue influence of Harbour. Respondent stated he had several clients/claimants who were prepared to join in a lawsuit against Harbour and gave Harbour a document entitled Outline Summary of Claims and Evidence Against Tomas J. Harbour, George Clark, Joan Clark and the Law Firm of Barlow & Wilcox that purported to state the claims of clients/claimants alleged by Respondent to be represented by him. Respondent stated if Harbour would relinquish control of EcoVersity and Prajna, the claims would not be pursued. Respondent also told Harbour that if Harbour did not relinquish control of EcoVersity by the following Friday, Respondent would obtain a temporary restraining order placing EcoVersity in receivership.

8. At the time of the meeting between Respondent and Harbour, Respondent was not licensed to practice law in New Mexico and was not admitted to practice in New Mexico until April 27, 2007.

9. On April 26, 2007, Respondent sent an email to Harbour in which Respondent again stated the Harwood probate proceedings had not been properly closed and attached to the email a settlement agreement and release of claims on behalf of unidentified claimants that Respondent purported to represent.

10. On May 9, 2007, Respondent sent an email to Harbour's attorney, Walter Melendres, in which Respondent stated: "I assure you that I faithfully and in good faith presented to Mr. Harbour the claims of at least one client."

11. Contrary to Respondent's statements to Harbour in the meeting of April 25, 2007 and the emails of April 26, 2007 and May 9, 2007, the estate was properly closed and Respondent did not in fact represent anyone with standing to sue or who was prepared to join in a lawsuit against Harbour either individually or as personal representative of the Estate of Francis Harwood.

12. On March 22, 2007, prior to Respondent's admission to practice in New Mexico and at a time when his Virginia license was inactive, Respondent

unsuccessfully solicited Sybil Harwood, Frances Harwood's sister, as a client to pursue claims against Harbour by virtue of an email to which there was attached a representation agreement. In the representation agreement, Respondent falsely stated that he was licensed and in good standing in Virginia when in fact his Virginia license to practice law was on inactive status at the time.

13. Sybil Harwood declined Respondent's offer of representation in her email to Respondent of April 5, 2007.

14. On August 17, 2007, Respondent sent a letter to the New Mexico Attorney General in which he requested the Attorney General to take legal action to expel the board members of EcoVersity and Prajna Foundation. In support of the allegations in the letter, Respondent attached to the letter a document entitled "Affidavit of Marie Wilkinson." The affidavit was not signed by Ms. Wilkinson, had never been reviewed by her and she had never discussed with Respondent the fact that he intended to attach the document to a letter to the Attorney General. The affidavit contained numerous statements attributed to Marie Wilkinson which she did not make or of which she had no knowledge.

15. In the letter to the Attorney General, Respondent, at the outset of the letter clearly indicated that Marie Wilkinson had not read the "Affidavit;" however Respondent continued to cite

the purported affidavit throughout his letter in a manner, which was confusing and misleading.

16. In his August 17, 2007 letter to the Attorney General, Respondent asserted that the estate of Frances Harwood was not properly closed and, therefore, the statute of limitations for bringing claims for breach of fiduciary duty against Harbour had not yet expired.

17. Respondent sent a letter to the board members of EcoVersity and Prajna dated March 4, 2008 in which he demanded their resignation and, in the event the board members refused to resign, Respondent threatened legal proceedings and damage to their standing in the Santa Fe community.

18. Respondent, since his original meeting with Harbour on April 25, 2007, has never followed through with any of his threatened legal proceedings.

19. Respondent sent a letter dated June 11, 2008 to Disciplinary Counsel in which he made the following statements all of which were untrue and known by Respondent to be untrue when made:

> a. that the complaint filed by Harbour with disciplinary counsel raised issues that will be addressed in upcoming litigation and

should be addressed in court rather than by the disciplinary board;

b. that the "parties anticipate there will be criminal and civil litigation; that Respondent is counsel for 'interests' opposed to Harbour and that there will be "upcoming litigation;"

c. that specific people with whom Respondent had spoken had standing to bring civil claims against Harbour;

d. that Respondent was speaking on behalf of some people who had standing to sue and that he had at least one client;

e. that prior to speaking with Sybil Harwood, attorney Diane Garrity had given her verbal assent "in principle" to serving as co-counsel in any legal proceeding initiated at that time;

f. that Marie Wilkinson stated repeatedly that she did not trust Harbour as steward of EcoVersity.

20. Notwithstanding the fact that at no time did Respondent represent anyone with standing to sue Harbour for his conduct as personal representative of the Estate of Francis Harwood or in any other capacity, Respondent sought to convey the

impression that he did by repeated references to court proceedings that would ensue if his demands were not met.

21. On numerous occasions, Respondent made allegations, which were not supported by evidence or by any good faith belief. For instance, Respondent's witness, Diane Garrity, testified that she had commented to Respondent regarding the conduct of attorney Jay Goodman in connection with a probate proceeding. Insofar as it relates to attorney Richard Barlow, Ms. Garrity testified that she was not a tax attorney or an estate tax attorney, did not know if Mr. Barlow's fee for authoring an opinion letter may have been high, and never used the word "exorbitant." In addition, she testified that she never told Respondent that she believed that Mr. Barlow's firm had "engaged in ethically and morally questionable conduct in attempting to secure for its client a bigger share of the estate than what was appropriate under the circumstances." Despite this lack of foundation, Respondent prepared an affidavit in which he swore under oath that Ms. Garrity had stated to him that she had been counsel to a party in interest in a probate matter in which Richard Barlow billed an exorbitant fee to the estate for a simple task and that Mr. Barlow's firm engaged in ethically and morally questionable conduct in attempting to secure for its client a bigger share of the estate than was appropriate under the circumstances.

22. Similarly, without basis in fact, Respondent suggested that Dr. Hendrieka Ann Fitzpatrick had been coerced or misled into deliberately falsifying a letter regarding her evaluation of the mental capacity of Frances Harwood during the week or so prior to her death. While Dr. Fitzpatrick acknowledged that there may have been some confusion regarding whether she visited with Ms. Harwood in the hospital on June 29 or June 30, 2003, there is no significance to that error in date. In fact, Dr. Fitzpatrick stated that, in her opinion, Ms. Harwood never became mentally incompetent before her death.

23. On several occasions in this disciplinary proceeding, Respondent stated or filed pleadings alleging that he was aware of acts of professional misconduct by Walter Melendres and/or Deputy Disciplinary Counsel Joel Widman. Despite such claims of knowledge of professional misconduct, Respondent never reported such alleged acts to the Supreme Court Disciplinary Board as required by Rule 16-803(A) NMRA.

24. Deputy Disciplinary Counsel, although proving that Respondent did make claims or contentions that were without basis, failed to prove that Respondent put forward these claims in a "proceeding" as required under Rule 16-301.

CONCLUSIONS

25. The foregoing conduct has been proven by a preponderance of the evidence.

26. By reason of Respondent's representations to Harbour and to the Attorney General that the Estate of Frances Harwood had not been properly closed and that the statute of limitations had, therefore, not yet run on claims against Harbour for breach of fiduciary duty, Respondent violated Rule 16-804(C) NMRA which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

27. By virtue of Respondent's having solicited Sybil Harwood to retain him to pursue a lawsuit against Harbour and Respondent's subsequent meeting with Harbour in which he advised Harbour that the Estate of Harwood had not been properly closed and that the statute of limitations had, therefore, not yet run on claims against Harbour for breach of fiduciary duty, Respondent violated Rule 16-505(A) NMRA by engaging in the unauthorized practice of law.

28. By virtue of Respondent's having told Harbour that the represented clients or claimants with standing to sue to reopen the estate of Frances Harwood when in fact he did not represent anyone with standing to assert claims in the Frances Harwood probate matter, Respondent violated Rule

16-804(C) NMRA which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

29. By virtue of Respondent's attaching the unsigned affidavit of Marie Wilkinson to the letter of August 17, 2008 to the Attorney General which affidavit of Marie Wilkinson had neither seen nor approved, and referring to the statements therein as if they were true, Respondent violated Rule 16-804(C) NMRA which prohibits a lawyer from engaging in conduct involving dishonesty, deceit or misrepresentation.

FACTORS IN AGGRAVATION

30. Respondent did not exhibit a selfish motive as set forth in ABA Standards For Imposing Lawyer Sanctions, Standard 9.122(b). Respondent did not seek to profit personally from his actions.

31. Respondent's conduct, although stretched over a certain length of time, had a single purpose and was a single offense, and therefore he did not engage in a pattern of misconduct consisting of multiple offenses as set forth in ABA Standards For Imposing Lawyer Sanctions, Standard 9.22(c) and 9.22(d).

32. There was sufficient evidence to justify a finding that the same conduct which resulted in the findings of violations of Rule 16-804(C) in paragraphs 26, 28 and 29, above, would justify a

finding that Respondent also violated Rule 16-804(H), which was in effect at the time the alleged acts were committed. However, because Rule 16-804(H) was subsequently repealed by the New Mexico Supreme Court, the Hearing Committee declines to find a violation of that Rule.

RECOMMENDATIONS FOR DISCIPLINE

33. Respondent's conduct in this matter, from his efforts to solicit clients, to his original meeting with Harbour, to his letter to the Attorney General, to his response to the charges, to his filing of repeated frivolous pleadings in this proceeding, to his demeanor during the hearing, to the content of his requested findings of fact and conclusions of law demonstrates that he has a total lack of understanding of his conduct and the consequences of his actions.

34. Respondent continues to believe that the focus of this proceeding is the conduct of Harbour and the EcoVersity and Prajna boards of directors and the will and probate of Frances Harwood rather than his professional misconduct.

35. Respondent continues to assert, despite the evidence to the contrary, that Walter Melendres and Joel Widman acted improperly in connection with the proceedings against him.

36. Respondent has continued to act in a bizarre and peculiar fashion, including the following after submitting his final requested findings and conclusions:

a) ON MAY 6 AT 11:08 A.M. – Respondent requested, via email, to be allowed to file a rebuttal regarding portions of disciplinary counsel's requested findings of fact and conclusions of law.

b) ON MAY 6 AT 11:19 A.M. – Hearing Committee Chairman Robert Rothstein responded via email that Respondent was not to submit any motions or other pleadings unless requested by the Committee.

c) ON MAY 6 AT 8:03 P.M. – Respondent, ignoring the ruling of the Chair of the Committee, filed his motion to strike portions of disciplinary counsel's findings and conclusions via email to the committee members.

37. Respondent did not seem to act out of selfishness, or try to benefit economically from his actions, or believe he did anything dishonest or underhanded in his efforts to "right" what he considered a "wrong."

38. Respondent simply does not seem to recognize that his conduct was wrong or to understand that the issues before this committee deal with his conduct, as opposed to the execution and probate of

the will, the operation of the corporate entities or the conduct of Mr. Melendres or Mr. Widman.

39. It is therefore recommended that Respondent be suspended indefinitely from the practice of law pursuant to Rule 17-206(A)(3) NMRA until such time as he can show that he has met the following conditions:

> A. Provide the Disciplinary Board with evidence that he has completed a mental health evaluation by a psychologist selected by the Disciplinary Board as to his ability and fitness to practice law, and that he has obtained appropriate counseling, if indicated.
>
> B. If he chooses in the future to pursue any claims for alleged wrongdoing by either Harbour or the officers or boards of EcoVersity or Prajna, he shall not serve as an attorney in connection with those claims, but may act as a private citizen.

40. Costs should be assessed pursuant to Rule 17-106(B) NMRA.

Submitted to the Disciplinary Board this 15th day of May, 2009.

/s/
Robert R. Rothstein

Electronically Approved 05/15/09
LaMerle M. Boyd

Electronically Approved 05/15/09
George W. Kozeliski

APPENDIX D

XXXXXXXXXX {**name of law firm** XXXXXXXXXX
XXXXXXX **redacted from letterhead**} XXXXXXX

ATTORNEYS AT LAW

XXXXXXXX {**name of lawyers and** XXXXXXXX
XXXXX **law firm contact information** XXXXX
XXXXXXX **redacted from letterhead**} XXXXXX

November 10, 2008

CONFIDENTIAL

VIA FEDERAL EXPRESS
Joel L. Widman
Deputy Disciplinary Counsel
The Disciplinary Board
P.O. Box 1809
Albuquerque, NM 87103-1809

RE: Claude D. Convisser, Esq.

Dear Mr. Widman:

You have asked me to review your proposed dismissal of the complaint filed by Jeff "R.P." Harbour against attorney Claude Convisser. I have reviewed the file and your memos. It is my opinion that Mr. Harbour does raise several claims against Mr. Convisser which are actionable under the New

Mexico Rules of Professional Conduct. It is my recommendation that those actionable claims should be subject to some type of disciplinary recommendations by the Disciplinary Board.

As you know, this is an extremely complicated file with a great deal of documentation and correspondence. I agree with your comment in your memo that there may be private causes of action which Mr. Harbour has against Mr. Convisser, and perhaps private cause of action that Mr. Convisser or his clients may have against Mr. Harbour. The problem is trying to separate out those causes of action from the allegations regarding claims of violations of the Rules of Professional Conduct. There are also a number of factual issues which are contested between Mr. Harbour and Mr. Convisser. I have tried to limit my findings with respect to "actionable claims" to those where the facts are mostly not in dispute.

My analysis has produced the following actionable claims:

A. Threats Made Based on Misrepresentation of the Law.

When Mr. Convisser first latched onto the Harwood estate project in 2007, he represented to Mr. Harbour, as well as to prospective clients, that there was a way of challenging the Frances Harwood probate which had been closed in July of 2005. The

Jeff Harbour May 13, 2008 letter to the Disciplinary Board recites that Convisser set up a meeting with Mr. Harbour on April 25, 2007 at the St. Francis Hotel to discuss EcoVersity. Decedent Frances Harwood had left the bulk of her estate to EcoVersity and another non-profit corporation called Prajna. Mr. Harbour had been Personal Representative of Ms. Harwood's estate, and was an officer and director of EcoVersity. According to Mr. Harbour's letter, at that meeting Mr. Convisser told Mr. Harbour that "due to a technical error on the part of the estate attorneys, Barlow & Wilcox, and the Judge, Barbara Vigil, the estate had not been legally closed. He told me that meant that the Will [of Frances Harwood] could still be challenged and that I [Harbour] faced some very serious problems." Mr. Convisser claimed that Frances Harwood's Will had been secured by undue influence or by fraud, and threatened a lawsuit against Mr. Harbour. As Mr. Harbour recites in his letter, "He [Mr. Convisser] showed me what he said was a draft of a lawsuit and what he told me were legal rulings which he said indicated that the Estate was still open...". Mr. Convisser then told Mr. Harbour that Mr. Harbour should resign his position at EcoVersity in order to avoid a lawsuit and bad press.

Mr. Convisser apparently made this same representation (that the probate had not been properly closed) to Sybil Harwood, sister of the decedent Frances Harwood, to try to convince her that she should become involved in legal action

against Mr. Harbour. In that regard, see Claude Convisser's June 11, 2008 letter to the Disciplinary Board, page 10, second paragraph, in which he says, "Sybil and I were actively considering filing a lawsuit reopening the probate...". Mr. Convisser continued with his threats against Mr. Harbour in an email to Mr. Harbour dated April 26, 2007, Exhibit 1 to Walter J. Melendres' May 13, 2008 letter. In that email, Mr. Convisser made claims that the six months [sic] statute of limitations for claims against a Personal Representative after the closing of the estate had not run, citing New Mexico Probate Code § 45-3-003. That section states that an estate may be closed by a verified statement sworn to by the Personal Representative under oath and filed with the court. Mr. Convisser stated in the email to Mr. Harbour: "The closing statement which you signed and filed with the Probate Court on July 5, 2005 was not signed under oath. Therefore, the statute of limitations...has not yet expired and claims could still be brought against you for breach of fiduciary duty in your capacity as Personal Representative of Fiz Harwood's estate for which you would be personally liable." Mr. Convisser also made this same claim, that the estate had not been properly closed, in his August 17, 2007 Petition to the Attorney General's Office, (Exhibit 6, page 8, to the exhibits to the Walter J. Melendres May 13, 2008 letter). Mr. Convisser stated: "Nor has the statute of limitations expired for claims of breach of fiduciary duty owed by Mr. Harbour and Barlow & Wilcox to the estate of Ms. Harwood."

Mr. Convisser's threats to Mr. Harbour and the representations he made to Sybil Harwood were legally incorrect. The New Mexico Probate Code defines how estates are to be closed. There are two types of estates: informal and formal. Informal estates may be closed by a verified statement sworn to by the Personal Representative as provided in the statute cited by Mr. Convisser. Formal estates, however, are closed by court order under NMSA 45-3-1001, not by the filing of a sworn statement by the Personal Representative. The Harwood estate was converted from an informal probate to a formal probate, and was closed by appropriate Court Order and hearing. If Mr. Convisser had read the statutes carefully, or read all of the probate pleadings in Ms. Harwood's estate, he would have discovered that it was properly closed. He was therefore threatening lawsuits against Mr. Harbour and giving legal opinions to Sybil Harwood based on an inaccurate representation of the law.

Mr. Convisser admits in his June 18, 2008 letter to the Disciplinary Board on page 17, the second paragraph: "I made this mistake in good faith, because I did not perceive in the probate file or understand that Mr. Harbour had at the last minute changed the proceedings from informal to formal. (I do not have experience in probate litigation; that is, in part, why I conferred with and sought co-counsel in Diane Garrity, a Santa Fe attorney with experience in probate litigation, should it become necessary to file suit reopening the probate)." Thus,

Mr. Convisser admits that he did not do his research. Ms. Garrity's July 31, 2008 letter to the Disciplinary Board states: "We had a couple of phone conversations but I did not assist Mr. Convisser in whatever litigation he decided to pursue. I cannot recall the specifics regarding the case, parties or what was pending and I heard nothing further from Mr. Convisser." It seems unlikely from the tone of Diane Garrity's letter that Mr. Convisser consulted her on any of the specifics about the statute of limitations or requirements for closing estates. If he had, she presumably would have corrected his faulty interpretation. Therefore, I believe he was making these representations based on his own in adequate reading of both the Probate Code and the Harwood estate file.

This error goes beyond what Mr. Convisser claims was a mere "good faith" error, in my opinion. Had he done his homework, he would have found that this section of the Probate Code does not apply. Mr. Convisser admits that he made a mistake and tries to claim that he sought co-counsel advice, but he did not. Mr. Convisser made legal misrepresentations to a member of the public, when he knew, or should have known, that the law did not support his interpretation. I believe this is a violation of New Mexico Rule of Professional Conduct 16-301. "A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous...". By itself, this misrepresentation might

not be actionable, but in conjunction with the other actionable items which I describe below, I believe it presents a pattern of misrepresentation that violates the Code Rules.

B. Unauthorized Practice of Law.

Mr. Convisser's June 11, 2008 letter to the Disciplinary Board, page 4, third paragraph, states that his involvement in the Harwood estate matter began in January of 2007 when Marie Wilkinson, an EcoVersity Board member, confided in him regarding possible wrongdoings by Mr. Harbour and others. Mr. Convisser at that time was not licensed in New Mexico or Virginia. He activated his Virginia State Bar license on March 29, 2007 (Convisser letter to Disciplinary Board June 11, 2008, page 15). Mr. Convisser learned by letter dated April 4, 2007 that he had passed the New Mexico Bar and that there was a swearing in ceremony on April 27, 2007 (Convisser letter to Disciplinary Board June 11, 2008, page 16, paragraph 1). Mr. Convisser met with Mr. Harbour 2 days earlier on April 25, 2007, when he threatened Mr. Harbour with a lawsuit as described above. Mr. Convisser continued his threats in his email sent to Mr. Harbour on April 26, 2007 (Exhibit 1 to Walter Melendres May 13, 2008 letter). Mr. Convisser was therefore practicing law in New Mexico without a license at that time, by making representations about what the probate code required to close an estate, before he was sworn in on April 27, 2007. Mr. Convisser also discussed his

reading of the statutes with Sybil Harwood in March of 2007 before he was licensed (see Convisser's June 11, 2008 letter to Disciplinary Board, page 15, third paragraph); however he claims that he informed Sybil Harwood that he was not yet licensed. (Note that he was not licensed then in Virginia either if the conversation took place prior to March 29, 2007.) He also had numerous discussions with Marie Wilkinson, a Board member of EcoVersity and an officer from January 2007 through April 2007. In Mr. Convisser's same June 11, 2008 letter to the Disciplinary Board, page 10, paragraph 3, he states with respect to this communications with Marie Wilkinson: "I had informed her of her standing as a continuing member of the Members Committee to bring such claims...". It appears therefore that Mr. Convisser was practicing law prior to the date he was sworn in, in New Mexico. He claims in his same letter to the Disciplinary Board that he apprised Marie Wilkinson of the status of his bar admissions (see letter p. 14, first paragraph). Nonetheless, clearly he was interpreting the law and giving advice and making threats and soliciting potential clients before he was admitted to the New Mexico Bar which is in violation of the Rule of Professional Conduct, 16-505(A): "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so." He also solicited Sybil Harwood as a client because he admits in that same letter (p. 13, second paragraph): "Sybil learned of me from a brief email I sent to her which simply stated that I had

discovered some new information regarding the management of her sister Fiz's estate and giving her my phone number...". This contact took place in March, 2007 (see Convisser July 31, 2008 letter, p. 8), prior to his admission to the New Mexico Bar. However, Mr. Convisser argues that since Sybil called him, rather than he calling her, this was not a "solicitation" of a client. (See his June 11, 2008 letter, p. 13 second paragraph.) Clearly he made the first contact prior to being admitted to the New Mexico State Bar. Mr. Convisser's after-the-fact claims that he was not practicing law or giving legal advice before he was admitted to the New Mexico Bar are disingenuous when measured against the facts concerning his interactions and representations made to Marie Wilkinson, to Mr. Harbour, and to Sybil Harwood, as well as his solicitation of legal employment by her.

Mr. Convisser claims as a defense that his practice of law prior to the date he was sworn in is allowed under Rule of Professional Conduct 16-505(E). Subpart (1) of that Rule states: "A lawyer admitted in another United States jurisdiction...may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter." (Emphasis added.) Mr. Convisser states in his June 11, 2008 letter to the Disciplinary Board (page 15, third paragraph) that he told Sybil Harwood that he would associate with Diane Garrity

"with whom I had discussed the general lay of the case. Before I told Sybil Harwood this, Ms. Garrity had given me her verbal assent in principle to serving as my co-counsel in any legal proceeding initiated around that time, provided we received a retainer." Yet, Diane Garrity's July 31, 2008 letter to the Disciplinary Board states that she did not assist Mr. Convisser, and that although they discussed developing a co-counsel relationship, that relationship was never finalized. Mr. Convisser's July 31, 2008 letter to the Disciplinary Board states on page 8, first paragraph: "Upon Santa Fe attorney Diane Garrity's considering the bare facts as they were presented in the probate file as I related them to her in two telephone conferences had in March 2007, she agreed with my aforementioned opinion and conclusion [regarding fraud and undue influence]." He also states in that same letter that he had several conversations with Sybil Harwood about the fraud issues "beginning later in March 2007." Thus, he was giving opinions on fraud issues prior to when he was sworn in to practice law in New Mexico, and when he had not entered into a co-counsel arrangement with Diane Garrity, and Diane Garrity was not actively participating in the matter as required by Rule 16-505(E)(1). The Rule requires direct and meaningful supervision, not an isolated conversation with an attorney who disavows that such a supervisory relationship existed.

Faced with an unauthorized practice of law claim, Mr. Convisser also sought to rely on subpart

(2) to rule 16-505(E). Because Mr. Convisser believed he was going to be sworn in on April 27, he felt that it was all right to make representations about the law in his meeting with Mr. Harbour on April 25 and his email on April 26. He states in his June 11, 2008 letter to the Disciplinary Board, page 9, second paragraph: "Therefore 'I reasonably expected' to be licensed in New Mexico within days concerning a 'potential proceeding before a court....or administrative agency.'", and cites NMRA 16-505(E)(2). That section provides that: "A lawyer admitted in another United States jurisdiction...may provide legal services on a temporary basis in this jurisdiction that:...(2) are in or reasonably related to a pending or potential proceeding before a court, legislative body, administrative agency or other tribunal in this or another jurisdiction if the lawyer, or a person the lawyer is assisting, is authorized by law or ordered to appear in such proceeding or reasonably expects to be authorized." (Emphasis added). It is not the purpose of the Rule to allow lawyers to subjectively decide to practice law depending on whether they "reasonably expect" to be admitted to the Bar; the purpose is to protect the public from lawyers practicing law in New Mexico when they are not licensed to do so. Mr. Convisser admits to giving legal advice prior to the time he knew he had passed the bar. He learned he passed the bar on April 4, 2007, but he admits having given legal advice to Marie Wilkinson prior to that date on standing, to contacting Sybil Harwood and discussing the case issues prior to that date, and to

giving opinions on the improper closing of the estate and fraud prior to that date. He could not have "reasonably expected" to be authorized to practice law in New Mexico in January-March 2007 when he did not know whether he had passed the bar. It appears that Mr. Convisser has engaged in the unauthorized practice of law in violation of NMRA 16-505.

C. Use of Unsigned Affidavit.

On August 17, 2007 Mr. Convisser wrote a letter to the New Mexico Attorney General Office requesting intervention by the State in an investigation of EcoVersity pursuant to NMSA § 57-22-9 (see Walter J. Melendres May 13, 2008 letter, Exhibit No. 6). Mr. Convisser attached several unsigned affidavits to that letter, including the affidavit of Marie Wilkinson. Mr. Convisser stated in his own affidavit, which is an exhibit to that letter, that Marie Wilkinson "has not reviewed the affidavit I drafted for her based on our two meetings and dozens of phone conversations and is not eager to get in the midst of a legal dispute...". He also noted on her affidavit, "Marie Wilkinson has not reviewed this Affidavit." Despite the fact that Mr. Convisser disclosed that the affidavit was not signed, he proceeded to quote from the affidavit in his letter to the Attorney General as if the affidavit were factually true. In that regard, see Mr. Convisser's August 17, 2007 petition to the Attorney General Office, page 14, the second major paragraph: "Third

Board member Marie Wilkinson, the Corporate Secretary who refused to be paid anything, demanded repeatedly that Mr. Harbour and Mr. Clark submit invoices or time sheets justifying compensation for their services rendered...". Also see page 15, the second paragraph in which he cited to the Marie Wilkinson Affidavit twice: "What [Mr. Harbour did] was to interfere, impede and obstruct the process, to the point that a master plan has never been adopted...Wilkinson Affidavit, paragraph 18...As a result of his failure to adopt a master plan and secure its approval by governmental planning authorities...state and local authorities red tagged Mr. Harbour's un-permitted construction...Wilkinson Affidavit paragraph 20." See also Mr. Convisser's letter to the EcoVersity Board of Directors dated March 4, 2008 (Exhibit 17 to the Walter Melendres May 13, 2008 letter) in which Mr. Convisser attached the Marie Wilkinson unsigned affidavit, offering it up as being true.

Ms. Wilkinson denies the affidavit is true or factually correct. In her letter, Exhibit 7 to Mr. Melendres' May 13, 2008 letter, she states: "I have just been presented with the unsigned affidavit which Claude Convisser submitted to the New Mexico Attorney General in my name. I was unaware an affidavit had been created in my name. I never sat down for a formal interview with Claude Convisser to prepare such a document nor did I create one myself. Mr. Convisser did not show me the affidavit prior to submitting it to the Attorney

General, and he submitted the unsigned affidavit without my permission. Having now read the affidavit, I find that it is not factual and indeed quite shocking in its loose and often incorrect presentation and interpretation of events and facts." Mr. Convisser's repeated citation to the unsigned Wilkinson affidavit as if it were factually true is a misrepresentation in violation of New Mexico Rule of Professional Conduct 16-804(C): "It is professional misconduct for a lawyer to: ...(C) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Mr. Convisser's July 31, 2008 letter to the Disciplinary Board states on page 14, last paragraph that he had put bold print on the Wilkinson affidavit which stated that she had not reviewed the text. He uses that bold print as an excuse for being able to include the unsigned affidavit in both his letter to the Attorney General Office and his letter to the EcoVersity Board. However, since Mr. Convisser cites to the information in the unsigned affidavit in both documents as if the statements in the affidavit were true, I believe this is an intentional misrepresentation in violation of this section of the Professional Code. Mr. Convisser's use of the unsigned affidavit in documents addressed to members of the public (the Board of EcoVersity) and addressed to the chief legal officer of the State of New Mexico (the Attorney General) is misleading, and undercuts the public's respect for the integrity of the legal profession.

D. Mr. Convisser's Misrepresentations Regarding His "Clients".

In April, 2007 Mr. Convisser claimed that he had clients he was representing, when he did not. In fact, apparently he did not find clients to represent in this matter until March, 2008, a year later. (See Convisser August 12, 2008 letter to Disciplinary Board, page 2). Yet in Mr. Convisser's April 25, 2007 meeting with Mr. Harbour, he alleged that he represented "claimants" whom he would not identify. Jeff Harbour's May 13 2008 letter, page 3, states, "He (Mr. Convisser) continued to say that many people were ready to join him in the lawsuit against me. He said he had several clients, but he was not permitted to reveal their names." Similarly, Walter Melendres' May 13, 2008 letter to the Disciplinary Board states, "Convisser stated in the April 27, 2007 meeting with Harbour that he represented clients with standing to sue Harbour. Convisser repeated this misrepresentation to Montgomery & Andrews despite being confronted with repeated requests to identify his clients." Mr. Convisser continued to make this claim (that he represented clients) in the email which he wrote to Mr. Harbour on April 26, 2007 (Exhibit 1 to Walter Melendres May 13, 2008 letter) in which he stated that there were "claimants" who desired to "move forward expeditiously in a way that will preserve the claimant's legal positions" and enclosed a draft of a settlement agreement in which he used the word

"claimants" whose "specific identity will be disclosed if and when you inform me that you are prepared to resign as we have discussed."

At that time, in late April 2007 Mr. Convisser did not have any clients. Mr. Convisser admits in his June 11, 2008 letter to the Disciplinary Board that he had spoken with Sybil Harwood at that time, but that she was not his client at that time and in fact they never entered into an attorney-client relationship. (See Mr. Convisser's June 11, 2008 letter to the Disciplinary Board, page 10, second paragraph.) Mr. Convisser's August 12, 2008 letter o the Disciplinary Board, page 3, second paragraph, in response to the Board's question about specific people that he had spoken to who would have standing to bring civil claims against Mr. Harbour, said in response that there were two people who would "fall almost directly under this category at that time" who were "Marie Wilkinson" and "Sybil Harwood" and possibly "Amy Pilling....may have had sanding to bring a claim...". Mr. Convisser admits, however, that he never entered into an attorney-client relationship with any of those individuals. In that same letter, when asked who he was counsel to, he states on page 1: "I was and remain today counsel to the people identified in this paragraph, who are an unincorporated association [Rescue EcoVersity]...I have provided legal advice to these people since around late March 2008." (Emphasis added.) There are no clients he cites whom he represented in April of 2007 when he made his

allegations and threatened lawsuits against Mr. Harbour, claiming that he represented clients with standing to do so.

When faced with the Disciplinary Board allegation that he did not have clients at that time, Mr. Convisser said in his June 11, 2008 letter to the Disciplinary Board, page 10, that he had been consulting with Marie Wilkinson and Sybil Harwood at that time who had considered retaining him and that: "I believed at the time of my meeting with Mr. Harbour that certain members of EcoVersity and Prajna Members Committee were prepared to file civil claims for breach of fiduciary duty and fraud against Mr. Harbour and others." He argues that since he had a reasonable belief that someone might hire him, that allowed him to represent to Mr. Harbour that he had clients. He states in that same letter, page 10: "I never told Mr. Harbour or Mr. Melendres that I had been retained, instead, that I was speaking to Mr. Harbour on behalf of many people interested in the....article in the Santa Fe Reporter, some of whom had standing to bring legal claims against him, and that I had at least one client [Sybil Harwood]." Mr. Convisser is being quite dishonest in this statement by on the one hand stating he did not represent that he had clients, because he admits that he did state that he had "at least one client." Clearly, the representations that he made to Mr. Harbour and to Mr. Melendres and the email that he wrote all show that he was representing to them that he had clients who were

"claimants". Mr. Convisser fundamentally misunderstands the nature of an attorney-client relationship, which under his approach would turn into a subjective interpretation by an attorney as to whether he has a client based on that attorney's "belief". Mr. Convisser apparently does not accept the definition of what is legal representation: a confidential, professional relationship between a qualified lawyer and a member of the public who employs his services. Mr. Convisser is dismissive of these ethical claims, and attempts in his response to differentiate between "claimants" and "clients." However, this ethical issue is not a question of syntax or "word-smithing". It is a fact that Mr. Convisser had no clients when he claimed to Mr. Harbour (a member of the public) and to Mr. Melendres (a licensed New Mexico attorney) that he represented persons with standing to sue Mr. Harbour. Mr. Convisser's misrepresentation is in violation of New Mexico Rule of Professional Conduct 16-804(C): "It is professional misconduct for a lawyer to:...(C) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

E. Raising Issues as to Which He Had No Standing.

The primary beneficiaries apparently of Ms. Harwood's trust were the Prajna Foundation and EcoVersity. Mr. Convisser represents neither of these entities. Even if there were not a statute of limitations problem, he does not represent anyone

who would have any standing to make a claim in the Frances Harwood probate. He admits that he does not represent the three persons he cites as possibly having standing, being Sybil Harwood, Marie Wilkinson and Amy Pilling. Similarly, Mr. Convisser's repeated attempts to have a grand jury summoned to investigate criminal fraud, or to have Mr. Harbour or other Board members removed from the Board, smacks of Mr. Harbour trying to carve out a legal role for himself when he does not represent anyone who has any standing to bring these claims. This, more than anything else, bothers me about the entire file. I believe this is in violation of Rule 16-301 of the New Mexico Rules of Professional Conduct. However, I do not recommend this issue as a basis for any disciplinary action, since a court of law would better address this issue.

Items A, B, C and D taken together constitute a pattern of misrepresentation and unauthorized practice of law which I believe is quite serious, and should be addressed by appropriate disciplinary action. Mr. Convisser threatened lawsuits and solicited potential clients, alleging potential claims based on his misreading of the Probate Code. He admits he did not read the Probate Code correctly and that he did not read the Probate file in the Harwood estate thoroughly to discover his error. He claims he had assistance of local counsel who assisted in his evaluation, but he did not. He made these representations and client solicitations when he was not yet authorized to practice law in New

Mexico. He used an unsigned affidavit to make representations to the public and to the New Mexico Attorney General concerning the alleged "truth" contained in the affidavit, and used the affidavit without the knowledge, review or consent of the purported affiant. He made misrepresentations about whether he had clients whom he was representing in his threatened lawsuit, claiming he had clients when he did not. All of these actions undermine the integrity of the legal profession and impair the quality of justice and demonstrate a disregard by Mr. Convisser for his role as an officer of the legal system.

Please let me know if you wish to discuss this matter further.

Very truly yours,

XXXXX **{signature redacted}** XXXXX

JMM:rlv

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

March 23, 2010

NO. 32,019

IN THE MATTER OF CLAUDE DAVID CONVISSER, ESQUIRE

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing, request for oral argument and motion to reconsider adoption of recommendation of Disciplinary Board, and the Court having considered said motions and request, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concerning;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is **denied**; and

IT IS FURTHER ORDERED that the request for oral argument and motion to reconsider adoption of recommendation of Disciplinary Board is denied.

IT IS SO ORDERED.

WITNESS, The Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 23rd day of March, 2010.

(SEAL) _____/s/_____
Madeline Garcia, Chief Deputy Clerk

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

November 24, 2009

NO. 32,019

IN THE MATTER OF CLAUDE DAVID CONVISSER, ESQUIRE

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

ORDER

This matter having come before the Court upon the Court's own motion, and the Court being sufficiently advised, notes the following:

1. On October 23, 2009, disciplinary counsel filed a request for review of the recommendation of the Disciplinary Board in this matter pursuant to Rule 17-316(A) (1) NMRA.

2. On November 3, 2009 this Court set this matter for hearing on November 30, 2009, and ordered Respondent to

file a response to disciplinary counsel's request for review no later than November 16, 2009.

3. On November 9, 2009, Respondent filed a "Notice of Issues", which this court construed as his response to disciplinary counsel's request for review but which we now construe as Respondent's own request for review pursuant to Rule 17-316(A) (1).

4. On November 16, 2009, Respondent filed a motion for an extension of time to file a brief on November 17, 2009, which this Court granted.

5. On November 17, 2009, Respondent filed a 113-page brief.

NOW, THEREFORE, IT IS ORDERED that the hearing scheduled for November 30, 2009, is VACATED.

IT IS FURTHER ORDERED that Respondent's brief is REJECTED and Respondent is ordered to file a substitute brief that complies with the formatting requirements of the Rules of Appellate Procedure, including the length limitations applicable to briefs in chief under Rule 12-213(F) NMRA, no later than December 18, 2009. *See* Rule17-316(B) NMRA (providing that any briefs

filed pursuant to Rule 17-316 shall be in "[t]he form ... prescribed by the Rules of Appellate Procedure"). The substitute brief shall address the issues raised in disciplinary counsel's request for review as well as any additional issues Respondent seeks to raise in this Court.

IT IS FURTHER ORDERED that disciplinary counsel shall file a brief no later than February 1, 2010, that complies with the formatting requirements of the Rules of Appellate Procedure, including the length limitations applicable to answer briefs under Rule 12-213(F) NMRA.

IT IS FURTHER ORDERED that upon the completion of briefing this Court will reschedule this matter for hearing.

IT IS SO ORDERED.

WITNESS, The Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of November, 2009.

(SEAL) _____/s/_____
Madeline Garcia, Chief Deputy Clerk

APPENDIX G

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

CLAUDE D. CONVISSER, ESQ.

Disciplinary No. 12-2008-559

An Attorney Licensed to Practice Before the Courts of the State of New Mexico

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT-ATTORNEY CLAUDE D. CONVISSER'S APPLICATION FOR DISCOVERY AND PRE-HEARING SUBPOENAS AND DEPOSITIONS

THIS MATTER having come before the Hearing Committee on the motion of Respondent Claude D. Convisser for permission to conduct discovery, take depositions and to issue certain subpoenas duces tecum in connection with the present proceedings, the Hearing Committee having reviewed the pleadings and determining that oral argument is not necessary:

FINDS that Respondent's motion is not well-taken insofar as it seeks to compel production of documents and the issuance of subpoenas duces tecum but is well-taken in regard to the request to take certain depositions. However, it is appropriate that those depositions be taken only under the terms of a protective order which limits the subject matter of the depositions to facts directly related to the allegations of misconduct contained in the specification of charges in this matter.

IT IS THEREFORE ORDERED that Respondent's application for discovery and prehearing subpoenas is hereby DENIED.

IT IS FURTHER ORDERED that Respondent's application to take depositions is GRANTED as follows:

1. Respondent is authorized to take the depositions of Thomas J. Harbour, Walter Melendres, Diane Garrity, Amy Pilling, Richard Barlow and Dr. Hendreika A. Fitzpatrik. Deposition subpoenas for those witnesses shall be issued by the Chair of the Hearing Committee forthwith.

2. The depositions of the above-listed individuals shall be narrowly and strictly limited to issues directly related to the allegations of misconduct contained in the specification of charges in this case.

3. A protective order is hereby granted which specifically bars counsel from inquiring into the following subject matters during the course of the depositions of the above-listed witnesses:

A. All matters pertaining to the offer to sell real estate as referenced in the subpoena for production or inspection sought by Respondent to be directed to Mr. Harbour;

B. All matters pertaining to the payment of fees to Walter Melendres and/or the law firm of Montgomery & Andrews;

C. All matters pertaining to correspondence requesting the persons to whom the correspondence was directed to refrain from speaking or petitioning against Mr. Harbour, the EcoVersity and/or the Prajna Foundation as referenced in the subpoenas for production or inspection sought by Respondent to be directed to Mr. Melendres and the Montgomery & Andrews law firm.

D. All matters pertaining to monies allegedly paid by the EcoVersity and/or the Prajna Foundation to Mr. Harbour, records and resolutions of the Board of Directors of those two entities pertaining to payments to Mr. Harbour; matters pertaining to the minutes of meetings of the Board of Directors of those two entities and resolutions of the Members Committee of those two entities referenced in the subpoena for production or inspection sought by Respondent to be directed to those two entities;

E. All matters pertaining to the preparation and/or execution of the will and trust of Frances Harwood, including all matters pertaining to the mental and physical condition of Frances Harwood at any time, all matters pertaining to a loan by Frances Harwood or her trust to George Clark and Joan Clark, the nature of legal services rendered to the estate of Frances Harwood and the amount of money paid for such services as referenced in the

subpoena for production or inspection sought by Respondent to be directed to Richard K. Barlow;

F. All matters pertaining to the physical and mental condition of Frances Harwood as referenced in the subpoena for production or inspection sought by Respondent to be directed to Dr. Fitzpatrick.

4. If, during the course of any of the above-referenced depositions, issues arise as to whether certain questions come within the scope of the protective order, the parties may call the chair of the hearing panel for a ruling as to whether the questions shall be allowed.

/s/
Robert R. Rothstein

Date: March 11, 2009

Electronically Approved 05/15/09
LaMerle M. Boyd

Electronically Approved 05/15/09
George W. Kozeliski

APPENDIX H

DISCIPLINARY BOARD
PLEADING INDEX – Volume I

In the Matter of CLAUDE D. CONVISSER, Esq.
No. 12-2008-559 Atty: JLW

TAB	DESCRIPTION	DATE
1	Specification of Charges	12/11/08
2	Notice and Designation of HC: [Pound, Rothstein & McCarthy]	12/11/08
3	Acceptance of Service	12/11/08
4	Certificate of Service	12/11/08
5	Notice of Replacement of HC Member La Merle M. Boyd for McCarthy	12/30/08
6	Cert of Service of Docs from Convisser	12/31/08
7	Resp. Motion to Dismiss Rule 16-301 as a basis for Disciplinary Charges Against Him	12/31/08
8	Resp. Motion to Dismiss Rule 16-804(H) as a basis for Disciplinary Charges Against Him	12/31/08
9	DC's resp to Motion to Dismiss Rule 16-301 & Rule 16-804(H) as a basis for Disciplinary Charges	1/15/09
10	Resp's Answer to the Specification of Charges	12/31/08
11	Notice of Hearing for 4/16/09 @ 9:00 a.m.	1/15/09

12	Resp's Reply to DC's Resp to his Motion to Dismiss Rule 16-301	2/02/09
13	Resp's Reply to DC's Resp to his Motion to Dismiss Rule 16-804(H)	2/02/09
14	Certificate of Service of Docs from Convisser	2/02/08
15	Resp's Motion to Relieve Amy Pilling of Non-Disparagement Restriction During her Testimony	2/17/09
16	Resp's Motion to Compel Amendment of the Charges to State Witness Marie Wilkinson's Address or, in the Alternative to bar her testimony	2/17/09
17	Respondent's Subpoena for Production or Inspection of Docs	2/17/09
18	Respondent's Subpoena for Deposition	2/17/09
19	Resp's Request for Subpoenas of witnesses to testify at the hearing	2/17/09

PLEADING INDEX – Volume II

TAB	DESCRIPTION	DATE
20	Respondent's Requests for Admission of DC	2/17/09
21	Respondent's Interrogatories of DC	2/17/09
22	Resp's Application for Discovery & Pre-hearing Subpoenas/Depos	2/17/09
23	Resp's Motion to Dismiss All Proceedings as Being Unconstitutional	2/17/09
24	Resp's Request for Subpoenas of Witnesses to testify at Hearing	2/17/09
25	Resp's Request for an Expedited Prehearing Conference	2/17/09
26	Respondent's Notice of Additional Witness he intends to Call to Testify at the Hearing	2/17/09
27	Resp's Motion to Compel Production of the Reviewing Officer's Report	2/17/09
28	Order Denying Resp's Motion to Dismiss Rule 16-301	2/25/09
29	Order Denying Resp's Motion to Dismiss Rule 16-804(H)	2/25/09
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APPENDIX I

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

CLAUDE D. CONVISSER, ESQ.

No. 12-2008-559

An Attorney Licensed to Practice Before the Court of the State of New Mexico

SPECIFICATION OF CHARGES

1. Rule 17-105(B)(3)(d) of the New Mexico Supreme Court Rules Governing Discipline empowers counsel for the Disciplinary Board to file a specification of charges against an attorney with the Disciplinary Board.

2. Claude D. Convisser, Esq., (hereinafter respondent) is an attorney licensed to practice law before the courts of the State of New Mexico and the Commonwealth of Virginia.

3. The factual allegations set forth in the Specification of Charges state acts of professional misconduct by respondent in violation of Rules 16-

301; 16-505(A); 16-804(C) and 16-804(H) of the Rules of Professional Conduct.

4. This matter arises out of a dispute between respondent, a former student at EcoVersity, and the board members of EcoVersity, Prajna Foundation and Jeff Harbour ("Harbour"), a board member and officer of EcoVersity and Prajna, over the manner in which EcoVersity should be operated. The purported basis for the dispute is the decision of the board of EcoVersity to operate "on-line" only and to discontinue live classroom teaching.

5. Frances Harwood ("Harwood") was the founder and benefactor of EcoVersity and Prajna which funds a portion of EcoVersity's operations. Harwood died in 2003.

6. On April 25, 2007, Harbour met with respondent at respondent's request. In the course of the meeting, respondent stated that the probate proceedings pertaining to the estate of Frances Harwood had not been properly closed, that the will could still be challenged and that it appeared that the will was procured through the undue influence of Harbour. Respondent stated that he had several clients who were prepared to join in a lawsuit against Harbour, but that if Harbour would turn over control of EcoVersity and Prajna to respondent, the claims would not be pursued.

7. At the time of the meeting between respondent and Harbour, respondent was not

licenses to practice law in New Mexico and was not admitted to practice until April 27, 2007.

8. On April 26, 2007, respondent sent an email to Harbour in which respondent again stated that the Harwood probate proceedings had not been properly closed and attached to the email a settlement agreement and release of claims on behalf of identified claimants that respondent purported to represent.

9. Contrary to respondent's statements to Harbour in the meeting of April 25, 2007 and the email of April 26, 2007, the estate was properly closed and respondent did not in fact represent clients or claimants who were prepared to join in a lawsuit against Harbour although respondent unsuccessfully solicited Sybil Harwood, Frances Harwood's sister, as a client to pursue claims against Harbour. At the time respondent solicited Sybil Harwood, respondent was on inactive status with the Virginia bar.

10. On August 17, 2007, respondent wrote to the New Mexico Attorney General requesting an investigation pursuant to NMSA 57-22-9 that authorizes the Attorney General to investigate charitable organizations. In his August 17, 2007 letter, respondent asserted that the estate of Frances Harwood was not properly closed and that, therefore, the statute of limitations for bringing claims for

breach of fiduciary duty against Harbour had not yet expired.

11. Respondent attached to the August 17, 2007 letter, the unsigned affidavit of Marie Wilkinson and although he disclosed that the affidavit was not signed, he quoted from the affidavit in the body of the letter as if the affidavit was factually true. Wilkinson had never seen the affidavit before it was attached to the letter, was not aware of the contents of the affidavit and was not aware that an affidavit was created in her name.

12. On May 13, 2008, Harbour filed a complaint alleging the foregoing facts with the office of disciplinary counsel.

COUNT I

13. By reason of respondent's representations to Harbour and to the Attorney General that the estate of Frances Harwood had not been properly closed and that the statute of limitations had, therefore, not yet run on claims against Harbour for breach of fiduciary duty respondent violated the following Rules of Professional Conduct:

a. Rule 16-301 prohibiting a lawyer from making claims or contentions that are without basis;

b. Rule 16-804(C) prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

c. Rule 16-804(H) prohibiting a lawyer from engaging in conduct adversely reflecting on his fitness to practice law.

COUNT II

14. By virtue of respondent's having solicited Sybil Harwood to retain him to pursue a lawsuit against Harbour and respondent's subsequent meeting with Harbour in which he advised Harbour that the estate of Harwood had not been properly closed and that the statute of limitations had, therefore, not yet run on claims against Harbour for breach of fiduciary duty, respondent violated Rule 16-505(A) of the Rules of Professional Conduct by engaging in the unauthorized practice of law.

COUNT III

15. By virtue of respondent's having told Harbour that he represented clients or claimants with standing to sue to reopen the estate of Frances Harwood when in fact he did not represent anyone with standing to assert claims in the Frances Harwood probate matter, respondent violated Rule 16-804(C) prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and Rule 16-804(H) prohibiting a

lawyer from engaging in conduct adversely reflecting on his fitness to practice law.

COUNT IV

16. By virtue of respondent's attaching the unsigned affidavit of Marie Wilkinson to the letter of August 17, 2008 to the Attorney General which affidavit Marie Wilkinson had neither seen nor approved and referring to the statements therein as if they were true, respondent violated Rule 16-804(C) prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and Rule 16-804(H) prohibiting a lawyer from engaging in conduct adversely reflecting on his fitness to practice law.

FACTORS IN AGGRAVATION

17. Respondent has exhibited a dishonest or selfish motive. ABA Standards Imposing Lawyer Sanctions, Standard 9.22(b).

18. Respondent has engaged in a pattern of misconduct consisting of multiple offenses. ABA Standards For Imposing Lawyer Sanctions, Standard 9.22(c) and 9.22(d).

19. The names and addresses of all witnesses presently known to the Disciplinary Board are:

Jeff Harbour

c/o Walter Melendres, Esq.
PO Box 2307
Santa Fe, NM 87501

Walter Melendres, Esq.
PO Box 2307
Santa Fe, NM 87501

Marie Wilkinson
c/o Walter Melendres, Esq.
PO Box 2307
Santa Fe, NM 87501

Sybil Harwood
13 Gray Garden
Cambridge, MA 02138

Some or all of these witnesses may be called telephonically.

20. It is expected that this matter will be prosecuted by Joel L. Widman, Deputy Disciplinary Counsel.

WHEREFORE, by reason of the foregoing, it is respectfully requested pursuant to Rule 17-309 NMRA that a hearing committee be designated to hear evidence and make findings of fact and recommendations to the Disciplinary Board and, if any of the charges are sustained, that Respondent be disciplined and assessed costs of this proceeding.

Respectfully submitted,

_____/s/_____

Joel L. Widman, Deputy Disciplinary Counsel
400 Gold Avenue, SW Suite 800
PO Box 1809
Albuquerque, NM 87103-1809
505-842-5781

Done this 10th day of December, 2008
in Albuquerque, New Mexico

APPENDIX J

Article II, Section 14 of the New Mexico Constitution states in relevant part:

A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

APPENDIX K

Rule 16-301 New Mexico Rules Annotated states:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

APPENDIX L

Rule 16-301 New Mexico Rules Annotated, Committee Commentary, para. 1 (adopted by N.M. Supreme Court order No. 08-8300-29) states:

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

APPENDIX M

Rule 16-505 New Mexico Rules Annotated states in relevant part:

A. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

* * *

E. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a court, legislative body, administrative agency or other tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's

practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within Subparagraphs (2) or (3) of Paragraph E and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. In transactions involving issues specific to New Mexico law, the lawyer shall associate counsel admitted to practice in this jurisdiction.

APPENDIX N

Rule 16-601 New Mexico Rules Annotated states in relevant part:

The legal profession has a responsibility to provide legal services to those unable to pay. In fulfilling this responsibility, a lawyer should aspire to:

A. provide legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

B. provide legal services at:

(1) a substantially reduced fee to persons of limited means; or

(2) no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would

significantly deplete the organization's economic resources or would be otherwise inappropriate.

APPENDIX O

Rule 16-703 New Mexico Rules Annotated states:

A. In-person, live or real-time contact. A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal or prior professional relationship with the lawyer.

B. Restrictions on all contacts. A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by Paragraph A, if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

C. Notice required. Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular

matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written, recorded or electronic communication, unless the recipient of the communication is a person specified in Subparagraphs (1) or (2) of Paragraph A.

D. Exceptions. Notwithstanding the prohibitions in Paragraph A, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

APPENDIX P

Rule 16-804(C) New Mexico Rules Annotated states:

It is professional misconduct for a lawyer to * * * engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

APPENDIX Q

Rule 17-104(B) New Mexico Rules Annotated states:

Reviewing officers. Any member of a hearing committee may serve as a reviewing officer. A reviewing officer, upon request of disciplinary counsel or the chair of the board, shall have the authority and duty to review, approve, modify or disapprove dismissals of complaints docketed for formal investigation and offers of informal admonitions proposed by disciplinary counsel. Any member of a hearing committee who participates as a reviewing officer during the investigation of an attorney shall not serve as a member of a hearing committee for any charges filed as a result of such investigation. The identity of the reviewing officer involved in a particular investigation shall remain confidential at all times, including after the filing of formal disciplinary charges. Upon request, the reviewing officer's report, without identifying information, may be made available to the attorney being investigated.

APPENDIX R

Rule 17-307(B) New Mexico Rules Annotated states:

Disposition prior to formal investigation. If the complaint does not set forth allegations which if true state reasonable cause to believe that a respondent-attorney has violated the Rules of Professional Conduct, a disciplinary counsel staff attorney may dismiss the complaint, provided that all doubts shall be resolved in favor of conducting a formal hearing. Within thirty (30) days after receipt of a complaint, if the allegations are serious enough to warrant a formal investigation the office of disciplinary counsel shall notify the respondent-attorney of the nature of the complaint. Upon good cause shown to the Supreme Court, the Court may order the delay in notifying the respondent-attorney of the pending investigation. Upon the request of any person affected by a dismissal, or sua sponte, the chair of the Disciplinary Board or a board member designated by the chair may, at any time, order further investigation of a complaint that has been dismissed by a disciplinary counsel staff attorney.

APPENDIX S

Rule 17-309 New Mexico Rules Annotated states in relevant part:

B. Contents of specification of charges. The specification of charges shall contain:

* * *

(2) the provisions of the Rules of Professional Conduct, court rule, statute or other law claimed to have been violated;

(3) the names and addresses of all known witnesses against the respondent-attorney.

* * *

C. Designation of hearing officer or committee and notice. Upon filing of the specification of charges, the chair of the Disciplinary Board, or the chair's designee, shall forthwith designate a hearing officer or a hearing committee to hear the matter, and shall mail copies of the specification of charges to the hearing officer or to the members of the committee. The chair shall issue a formal notice to the respondent-attorney which shall advise the respondent-attorney that formal charges of unprofessional conduct have been instituted against the respondent-attorney and referred for hearing to a hearing officer or hearing committee giving the names and addresses of the members thereof and identification of its chair. The notice shall formally advise the respondent-attorney of the following:

* * *

(3) the respondent-attorney has the right to be represented by counsel, to appear at

all hearings, to confront and cross-examine the witnesses and to present relevant evidence in the respondent-attorney's own behalf;

(4) the right to the assistance of subpoenas to be issued at the respondent-attorney's request and to discovery in accordance with these rules.

APPENDIX T

Rule 17-311 New Mexico Rules Annotated states:

A party may apply to the chair of the hearing committee for permission to conduct discovery prior to a formal hearing. Upon a showing of good cause, the chair may permit discovery upon such terms as may be appropriate under the circumstances.

APPENDIX U

Preface, New Mexico Rules Governing Discipline, states in relevant part:

A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.

APPENDIX V

Scope, New Mexico Rules of Professional Conduct, states in relevant part:

Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.

APPENDIX W

D.C. Court of Appeals, Board on Professional Responsibility, Rule 11.5 states:

Bar Counsel shall have the burden of proving violations of disciplinary rules by clear and convincing evidence.

APPENDIX X

Virginia Rules of Professional Conduct, Rule 8.3(e)(1), states:

A lawyer shall inform the Virginia State Bar if:

> (1) the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction.

APPENDIX Y

Virginia Supreme Court Rules for Disciplining, Suspending and Disbarring Attorneys, Section 13-18(L), states:

If the Board concludes that the evidence fails to show under a clear and convincing evidentiary standard that the Respondent engaged in the Misconduct, the Board shall dismiss any Charge of Misconduct not so proven.

APPENDIX Z

ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 4(D)(1), states:

Ex Parte Communications with Disciplinary Counsel. Members of a hearing committee, the board, or the court shall not communicate ex parte with disciplinary counsel regarding a pending or impending investigation or disciplinary matter except as explicitly provided for by law or for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits provided that:

(a) it is reasonable to believe that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and

(b) provision is promptly made to notify all other parties of the substance of the ex parte communication and an opportunity to respond is allowed.

(2) A violation of this rule shall be a ground for lawyer or judicial discipline, as appropriate, and cause for removal from the hearing committee or the board.

APPENDIX AA

BEFORE THE SUPREME COURT OF NEW MEXICO

DOCKET NO. 32,019

IN THE MATTER OF

CLAUDE D. CONVISSER, ESQUIRE

An Attorney Licensed to Practice
Before the Courts of the State of New
Mexico

TRANSCRIPT OF PROCEEDINGS
February 24, 2010
9:00 a.m.
237 Don Gaspar Avenue
Santa Fe, New Mexico 87501

PURSUANT TO THE NEW MEXICO RULES OF CIVIL PROCEDURE, this hearing was:

TAKEN BY: THE NEW MEXICO SUPREME COURT

REPORTED BY: Betty J. Lanphere, NM CCR #70
Betty J. Lanphere & Assoc's, Inc.
Post Office Box 449
Santa Fe, New Mexico 87504

APPEARANCES

FOR DISCIPLINARY BOARD:

DISCIPLINARY BOARD
BY JOEL L. WIDMAN, DEPUTY
DISCIPLINARY COUNSEL

FOR THE RESPONDENT:

LAW OFFICE OF CLAUDE D. CONVISSER
Attorney at Law
BY CLAUDE D. CONVISSER, ESQUIRE,
PRO SE

* * * [12]

MR. CONVISSER: May it please the Court, I would like to begin by acknowledging and introducing to the court two people who are here to show their support for me. The first is Dr. Janeen Maas, who is a family practitioner here in Santa Fe formerly of La Familia, and now she has her own medical practice, and she is here to show her support for the fact that I am not legally insane or that I am not in need of a mental health evaluation, which is of course the findings and recommendations of the hearing committee.

The second person is Professor Laura Gomez who has known me for 26 years and when she was assistant dean of faculty about two and a half years ago, invited me to teach professional responsibility at the law school in Albuquerque. That is on the basis of her knowing my personal integrity,

credibility and honesty and also her knowledge of my professional background and abilities.

I have taught CLEs on professional responsibility for four years in Washington D.C. area. And Professor Gomez did testify at the

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hearing and the hearing committee did not acknowledge her testimony in any way. Nor did they acknowledge the testimony of two of my other witnesses, one of whom is a member of the Public Regulation Commission, Jason Marks.

Let me begin now by --

JUSTICE DANIELS: They were not fact witnesses, they testified -- well, at least Professor Gomez wasn't. She was essentially a character witness the way I recall reading her testimony.

MR. CONVISSER: That is correct, Your Honor, her testimony went to the mitigating factor of honesty. * * * And let me just say that Mr. Widman on cross-examination of Professor Gomez did ask her about whether or not my use of the unsigned statement which I disclosed in four places, not only in the letter to the Attorney General at the very beginning, but also on the affidavit, on the unsigned statement itself, and

[14]

also in my own affidavit that I gave to the Attorney General, and also on the list of exhibits that it was unsigned and unreviewed by the witness. Anyway, he did ask her whether she thought that would affect her opinion of me and she said no, it would not.

* * * [19]

The second mistake that I would like to admit to the Court so that there is no question that I am afraid to confess a mistake or an error or wrongdoing, if I ever committed a thing like that.

[20]

It is in my letter of June 11, 2008, to disciplinary counsel, which was my initial letter in response to Virginia Ferrara's notice to me that there had been a complaint filed against me.

And some of the statements in that letter are inconsistent with my subsequent trial testimony.

Mr. Harbour had submitted two letters to disciplinary counsel totaling twenty pages. They were single spaced, including allegations that I had violated fourteen Rules of Professional Conduct.

In my initial submission to disciplinary counsel, which was 26 pages single spaced, I was trying to address everything that was covered in the complaint against me, and Ms. Ferrara's letter, which I asked to move into evidence as Exhibit 1, which motion was denied, said to me that this Court had authorized her to conduct an informal investigation.

If you look at the very beginning of my letter of June 11, 2008, which is Exhibit 5, I say I am replying informally. So there are some inconsistencies in that letter with regards to my communications with Mr. Harbour and his counsel Walter Melendres, about whether I used the term representing a client at my meeting -- at the

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meeting of April 24th with Mr. Harbour. And I (inaudible) use that terminology in my letter.

Upon receiving the formal charges, I then looked at all the emails and basically recalled, helped me to refresh my recollection as to the exact sequence of events. Sibyl Harwood and I entered into a limited attorney-client relationship on or about May 1st, 2007.

JUSTICE DANIELS: And that is nowhere in writing, is that correct?

MR. CONVISSER: That is correct.

CHIEF JUSTICE CHAVEZ: All we have is her April 5th written statement that she is not interested.

MR. CONVISSER: And at the end of that letter, if you read the end of that --

CHIEF JUSTICE CHAVEZ: I did read the end of it.

MR. CONVISSER: She says, let me know if this carries on and I may be able to help you along the way.

So I had been in communication with her around the time when I met with Mr. Harbour and she did agree on May 1st. And then she asked me further to send her a seventeen page fax, which I did, and

[22]

she then forwarded it to her counsel in New York City, at least that's what she told me she was going to do.

But she and I did enter into that limited attorney-client relationship so that as of the time of my subsequent communications about a week later, May 6th to May 8th, with Walter Melendres, I did say

to him that I was representing a client and that was a truthful statement.

So that situation had changed between the time of my meeting with Mr. Harbour of April 24th and my subsequent communications with --

* * * [35]

JUSTICE DANIELS: What is the factual and legal basis for the recommendation of a mental examination?

MR. WIDMAN: Well, I think, I think the, first of all, I want to make it clear that we did not secretly request a mental health evaluation. This is something that originated with the hearing committee.

CHIEF JUSTICE CHAVEZ: Does the committee have authority to do that?

MR. WIDMAN: I believe they do have authority to do that.

CHIEF JUSTICE CHAVEZ: What rule?

MR. WIDMAN: Well, it's not provided in the Rules, but I think that as a -- I think, I think it goes to the respondent's qualification to practice law.

JUSTICE DANIELS: What evidence was there of his mental illness?

MR. WIDMAN: There was no -- We didn't introduce evidence of his, of any mental illness. I believe, as I said before, that any conclusions that the hearing committee or the board panel made were based on their own observations of Mr. Convisser's --

[36]

CHIEF JUSTICE CHAVEZ: What expertise do they have to make such an observation? What

expertise do either of these panels have to assess somebody's mental capacity?

MR. WIDMAN: Well...

CHIEF JUSTICE CHAVEZ: You have to agree that that's an unwarranted finding, don't you?

MR. WIDMAN: Huh, I think -- I could speculate as to what the finding -- the findings were based on, but I don't think that would be helpful to the Court.

JUSTICE MAES: Did Mr. Convisser have advance notice that the hearing committee was going to consider this issue?

MR. WIDMAN: No.

JUSTICE DANIELS: Would you ask us to speculate on that in upholding that recommendation?

MR. WIDMAN: Well, I think that based on...

JUSTICE DANIELS: What basis would we have to order that he submit to a mental examination?

MR. WIDMAN: Well, I think Mr. Convisser's speculation as to the motives and the intent of disciplinary counsel, the underlying basis...

JUSTICE DANIELS: You have run into that

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before, haven't you?

MR. WIDMAN: Pardon me.

JUSTICE DANIELS: You have run into that before, haven't you, suspicion about your motives and your zeal?

MR. WIDMAN: Yes, I certainly have.

JUSTICE DANIELS: We would have a lot of mental exams if we ordered them based on that.

MR. WIDMAN: Well, that's true and when, huh, we have had, huh, we have had mental evaluations in the past in matters where hearing committees and board panels have required mental examinations.

JUSTICE DANIELS: Where there was something in the record though, right?

MR. WIDMAN: Pardon me?

JUSTICE DANIELS: Where there was something in the record to support it?

MR. WIDMAN: Yeah, when there was something in the record to support it.

JUSTICE DANIELS: All right.

MR. WIDMAN: And in this case, unfortunately the hearing committee didn't directly point to anything in the record that did, that did support their recommendation of the board panel.

* * * [41]

CLERK: Attend the court, please.

CHIEF JUSTICE CHAVEZ: Please be seated. We are back on the record in the matter of Claude David Convisser, Case Number 32,019.

The Court has retired and deliberated and we have reached a unanimous decision in this case.

Mr. Convisser, the Court concludes that having read the entire file, that the findings are supported by substantial evidence. We will not require a mental health examination.

We will suspend you for one year under the provisions of 17-206(A)(2), but we will defer that suspension.

The suspension will be deferred on the condition that you comply with all the Rules of

Professional Conduct, that if any complaints are filed against you, that you promptly respond to those complaints.

In addition, costs are assessed against you in the amount reflected in the exhibit

[42]

filed with this Court, the total amount being $5,814.44. You have 90 days from today's date to pay that amount.

APPENDIX BB

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT
STATE OF NEW MEXICO

DISCIPLINARY NO. 12-2008-559

In the Matter of

CLAUDE D. CONVISSER, Esq.

An Attorney Licensed to
Practice Before the Courts of
the State of New Mexico

Proceedings before the Hearing Committee
September 11, 2009
8:55 a.m.
201 Third Street, Northwest
Suite 1800
Albuquerque, New Mexico

REPORTED BY:
Mary Abernathy Seal, RDE, CRR, CCR 69
Bean & Associates, Inc.
Professional Court Reporting Service
201 Third Street, Northwest, Suite 1630
Albuquerque, New Mexico 87102

(4165D) MAS

[2] APPEARANCES

For the Disciplinary Board:
MR. JOEL L. WIDMAN
DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

For Mr. Convisser
MR. CLAUDE D. CONVISSER

Members of the Hearing Committee:

Ms. Sandra Rotruck, Board Panel Chair
Mr. Steven L. Gonzales, Board Panel Member
Ms. Carolyn R. Tinker, Board Panel Member

* * * [13]

MR. WIDMAN: * * * The first ground in support of the motion

[14]

is selective prosecution. And one doesn't have to read that very carefully at all to reach the conclusion that the grounds are based on speculation and supposition. There are simply no facts that Mr. Convisser can point to that would support the conclusion that the decision was made to selectively prosecute him. In fact, he ignores in his motion the fact that this matter was submitted to a reviewing officer and the reviewing officer, in fact, recommended prosecution which turned out to be a 13-page opinion.

In State versus Estrada, 130 New Mexico 358, that he cites, one of the elements of selective prosecution is that the selection was invidious, or in bad faith, and based on impermissible considerations, such as race, the exercise of constitutional rights, religion, and so on. There is no showing that our decision to bring charges in this matter was based on any of those factors, and perhaps the strangest argument that he makes is that under Rule 307(b), we are required to resolve all doubts in favor of conducting a hearing. What Mr. Convisser is arguing is that if we did that, we would be so inundated with hearings that we wouldn't be able to conduct them all. So therefore, we must

[15]

be selectively, you know, prosecuting.

And I would also point out that, you know, this is like the old speeding-ticket cases that we had in law school. It's not a defense to say, "Well, the guy in front of me was also speeding, so why didn't you stop him?"

The defendant in the case has to show that the selection was, in a way, discriminatory and that the discrimination was based on impermissible considerations, and Mr. Convisser has failed to show that.

There is also an allegation of prosecutorial misconduct, one of which is that I was coaching witnesses. What Mr. Convisser doesn't point out is that the context – what he's done is, he's told half

the story. He says that in the course of a deposition, I told a witness that it was permissible to say that he or she couldn't remember as an answer to a question. Well, that comment was made after Mr. Convisser told the witness the question calls for a yes-or-no answer. And then I interjected and said, "Or I don't remember." And I submit that that is not coaching the witness any more than Mr. Convisser was coaching the witness when he told the witness that the question required

[16]

a yes-or-no answer.

He argues that our argument that Rule 16-301 does not require a proceeding is frivolous, because somehow the ABA opinion in question doesn't provide that, and the ABA opinion that we cited from, which is opinion number 94-383 at page 3, clearly states Rule 3.1 prohibits an advocate from asserting frivolous claims. A lawyer who threatens to file a complaint that is not well-founded in fact and in the law violates Rule 3.1. And Rule 3.1 that the ABA refers to is the same as our Rule 301. And there's no question that ABA opinions are not law in New Mexico, but the Supreme Court has said that they do look to ABA opinions for guidance, even though they're not bound by them. And I submit that it is not misleading for us to argue a point and to cite to an ABA opinion, particularly in the absence of other authority.

Mr. Convisser makes a number of claims, that I lied having a telephone conversation with Sybil

Harwood, who was never called as a witness to begin with. What happened in that situation was Sybil Harwood was represented by Curtis Schwartz, a lawyer with the Modrall firm in Santa Fe. I met with Mr. Schwartz to arrange a telephone

[17]

conversation with Sybil Harwood at his office in Santa Fe. We called Ms. Harwood at the time, and she wasn't there, and Mr. Schwartz said, "Well, I don't have any objection if you call her on your own outside of my presence."

And I said, "Okay, I'll do that," which I did.

And I had one or two conversations with Sybil Harwood and determined that, in fact, I was not going to call her as a witness and did not, in fact, call her as a witness. So I don't know how that affects Mr. Convisser's case preparation, if at all, but in any event, he seems to have been upset by the fact that I may not have had a conversation with Ms. Harwood, and that -- when, in fact, I did.

He claims we misrepresented our open file policy. We have a policy in our office that after charges are filed, we make the file available to the respondent to review, and that was done in this case. The only thing that was pulled out of the file were my notes and my impressions of the case that were made in preparation for the hearing. Mr. Convisser says without any basis that I appeared to sanitize the file, which we didn't. All areas of fact or -- now, the only thing we did sanitize, by

[18]

the way, is when we produced the reviewing officer's report, we deleted the name of the reviewing officer from the report, which is specifically provided for in the rules.

And finally, getting back to the Stein case, Mr. Convisser says that I was admonished by the Hearing Committee for hiding a document, which are the words he used. Well, the document that he accuses me of hiding, in fact, came to light because we produced it as a part of our open file policy, and what the document consisted of was a letter from Judge Vanzi, who had originally filed the complaint against Stuart Stein, in which Judge Vanzi stated that appropriate proceedings are confidential and therefore, you know, you can't use any of the information, you know, that I'm giving you. Which kind of leads to the question, well, you know, what are we supposed to do with the complaint if we can't use any of the information that the complainant provides us with?

And we later had, in fact, a hearing before Judge Vanzi in the course of the Hearing Committee hearing, in which Judge Vanzi came down and testified, and she said the letter was rescinded, and that was pretty much the end of the

[19]

matter. But I did not hide the document. I, in fact, produced the document. And that is another example of Mr. Convisser adding two and two and getting five. It just never happened.

There's also an allegation that I participated in obtaining a false affidavit from Dr. Fitzpatrick. What happened there was, Walter Melendres had submitted to me a statement of Dr. Fitzpatrick that was a purported statement that was unsigned, or may have been signed but it wasn't notarized. And I called him or emailed him or whatever, and said, "You know, can we have this notarized?"

And he said, "Okay," and gave us a notarized copy.

I had nothing to do with the content of the document, and, in fact, Dr. Fitzpatrick testified in the course of the hearing and I believe, although I don't remember specifically, that Mr. Convisser cross-examined her regarding the contents of the document and what she had to do -- Ms. Harwood's mental condition at the time she executed the will in question, which Mr. Convisser seems to feel was obtained under undue influence. But that's neither here nor there. I did not

[20]

prepare the document or participate in the document's preparation.

I think those are all the points that Mr. Convisser raises in his motion to dismiss.

Just in summary, there was no prosecutorial misconduct in this case. And there is absolutely no basis for a determination that we selectively decided to prosecute Mr. Convisser.

* * * [26]

And Mr. Convisser seems unable to detach himself. In fact, as we speak, there is a petition that was initiated by Mr. Convisser that was filed in the district court in Santa Fe pursuant to some state statute that permits laypeople to circulate a petition asking that an individual be indicted, and he's involved in attempting to, I believe, get Mr. Harbour indicted for his conduct in connection with his activities with Prajna and EcoVersity.

So I think what we have is a situation where, you know, this just has grown beyond -- you know, this has gone beyond a simple emotional involvement, and has gained the attributes of a holy war conducted by Mr. Convisser in this case, and a lawyer should have an off switch, and you know, a lawyer show know, "Okay, that's the end of the case. Everything has its logical conclusion, and I'm at the point where this is over, and now I'm going to get on with my life and do something else."

And Mr. Convisser seems unable to do that.

[27]

And I'm not a psychoanalyst, so I won't speculate as to why he's doing what he's doing or what's motivating his conduct in this case, but it's certainly not the conduct we want to see in somebody admitted to practice law in New Mexico.

* * * [66]

MS. TINKER: I want to say this to the two of you with the two of them listening. This is

something that I will say to you again when we discuss privately. But I want them to know now what I'm going to say later on.

The thing that is very troubling is that so much of this, beyond the specific charges and now findings relative to Mr. Convisser's behavior, relative to the move, beyond that, separate from that, this is a lot about -- it's a whole power matter. A whole bunch of people over a period of time have had mood swings like crazy in an effort to determine who is in control of something. There is no truth there ever. As my former husband, who used to be the chief deputy district attorney in this county, used to say, Truth is like mercury. You get it into this little ball, and you push your finger down and it goes like that. And then you gather it all up again, and you nail it, and it splinters again.

And that's what is so confusing about finding where the truth is. Where violations have occurred, I can be very clear. But who has said what to whom is not -- it's not a set of facts that can be found, because what a woman said to you on one day may have changed to something else on another day when she felt differently. What you have said to people, what you have recorded people have said to you has been colored by your own emotional status from one moment to the next.

Your reputation has been damaged. Mr. Harbour's reputation has been damaged. The University's reputation has been damaged. There

are a lot of people who are fooling around with the flow of power and mood swings and that's what is difficult to figure out about how to resolve.

So I will ask to defer to the two of you, saying I'm not even going to be too worried about who said what to whom and who felt what and who threatened what, because I don't think we can prove any of that. But I will say to you, show me the violations of the requirements of someone practicing law, and if there are violations, then the appropriate punishment. But all the rest of this story is just crazy-making.

That's my statement, and I wanted the two of you to hear it.

APPENDIX CC

Rescue EcoVersity

Founder Frances "Fiz" Harwood established EcoVersity in Santa Fe to teach sustainability to the broader community. We, the undersigned, are concerned that EcoVersity is languishing under the guidance of board members who took it over after she died of cancer in 2003.

Six days before she died, "RP" Harbour and his cohorts had Fiz Harwood sign a new will giving "RP" control of her estate, EcoVersity, and its sister foundation Prajna. These people benefitted personally and financially from this maneuver and its outcome was contrary to the wishes Fiz expressed to her many friends. These circumstances raise the suspicion of criminal fraud.

/s/	/S/
Frances Harwood signature on will 6 days before her death procured by "RP" Harbour	Frances Harwood signature when in full possession of her faculties

We petition the First Judicial District Court to convene a grand jury to investigate these matters, pursuant to Article II, section 14 of the New Mexico Constitution.

Registered voters of Santa Fe City and County:

Signature	Print Name

Return to: Rescue EcoVersity, P.O. Box 6397
Santa Fe, N.M. 87502

For more information, visit
www.rescueecoversity.org

EXHIBIT HH

APPENDIX DD

Laura E. Gomez, J.D., Ph.D.
2221 Dietz Place, N.W.
Albuquerque, NM 87107
(505) 344-4082 (H)
(505) 277-2113 (O)

Virginia Ferrara, Chief Disciplinary Counsel
Disciplinary Board
Supreme Court of New Mexico
P.O. Box 1809
Albuquerque, New Mexico 87103-1809

June 6, 2008
Re: Bar Complaint Filed Against Attorney Claude D. Convisser

Dear Ms. Ferrara:

I write as a character reference for Mr. Claude Convisser, Esq., whom I understand has had a complaint filed against him with the Disciplinary Board. I have known Claude well for nearly 25 years, since we attended Harvard College together in the 1980s. Over the course of our friendship, I have communicated with him regularly via mail, phone, and in person periodically, despite the fact that during most of that time we have lived in different states. Since he moved to New Mexico two years ago, I have maintained more frequent contact with Claude. I feel that I know him extremely well.

I am a tenured Professor and Associate Dean at the UNM School of Law, where I have taught since 2005. Prior to that, I was a tenured professor at the UCLA School of Law, where I taught for 12 years. I am a native New Mexican and returning to teach at UNM was a homecoming for me.

Although I do not know the details of the allegations against Claude, I wholeheartedly commend him as an honest and conscientious person who has extremely high moral standards. Over the decades that I have known Claude, I also have relied on his expertise and assistance as a professional colleague and legal adviser, and I can say without hesitation that he abides by the highest standards of professional ethics. In this regard, he is an exemplary role model of an ethical attorney whom I would hold up to my current and former students. In fact, I have suggested to Claude that he consider teaching Professional Responsibility as an adjunct professor at the law school, and I believe he would be supremely qualified in this role.

Please do not hesitate to contact me if I can provide you with additional information.

Sincerely,

/s/

Laura Gomez, J.D., Ph.D.

cc: Claude D. Convisser

EXHIBIT Q

APPENDIX EE

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of
CLAUDE D. CONVISSER, ESQ.

Disciplinary No. 12-20080559

An Attorney Licensed to Practice
Before the Courts of new Mexico

HEARING
Volume 1
April 16, 2009
9:00 a.m.
Rothstein, Donatelli, Hughes,
Dahlstrom, Schoenburg & Bienvenu, L.L.P.
1215 Pasco de Peralta
Santa Fe, New Mexico 87501

BEFORE:
MR. ROBERT R. ROTHSTEIN,
Committee Chairman
MR. GEORGE W. KOZELISKI
MS. LaMERLE M. BOYD

REPORTED BY: Jan A. Williams, RPR, CCR 14
Bean & Associates, Inc.
Professional Court Reporting Service
201 Third Street, Northwest, Suite 1630
Albuquerque, New Mexico 87102

(2072D) JAW

[2] A P P E A R A N C E S

For the Disciplinary Board of the New Mexico Supreme Court:

MR. JOEL WIDMAN
Deputy Disciplinary Counsel

Pro se:

MR. CLAUDE D. CONVISSER

For Thomas Jeffrey Harbour and Walter Melendres:

MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
505-982-3873
BY: MR. VICTOR R. ORTEGA

Also Present:

THOMAS JEFFREY HARBOUR
MARK BEAVER

* * * [8]

CLAUDE D. CONVISSER,
after having been first duly sworn under oath,
was questioned and testified as follows:

EXAMINATION

BY MR. WIDMAN:

* * * [9]

Q. You reactivated your Virginia license on March 29, 2007; is that correct?

A. I was notified by a letter which is marked as Exhibit A-1. The letter is dated April 12, 2007, that the reactivation of my Virginia State Bar status was

effective on March 28, 2007. However, I had been notified before that date that my status was activated or essentially in a phone conversation which would have been around -- I would have to look at a calendar to tell you. But it was just a few days before that.

Q. Are you --

A. If I may just also say, that was following my completion of 12 hours of CLE credit. During March of

[10]

2007, I intended to activate my Virginia bar status. I completed the CLE's here in New Mexico.

And on the date of the last course which was March 22nd [sic -- should be March 20th], I sent all of my documentation by overnight express mail to the Virginia State Bar so it would be activated officially as soon as possible after that date. And there's actually an exhibit that identifies the dates that I took the CLEs.

* * * [11]

Q. Okay. And what is the nature of the legal matters in which you are representing clients?

A. I am general counsel and president of an alternative fuels business called Plant Oil Powered Diesel Fuel Systems. I represent them in all legal matters which involve permitting, interaction with government, such as lobbying, and any negotiations, contract negotiations, and litigation that comes up.

I also have one domestic relations matter on which I'm representing a client who is basically a friend. And then my involvement in the EcoVersity matter which this group called Rescue EcoVersity which is an unincorporated association of citizens. I think that's the only matters in which I'm presently

committed engaging with the practice of law.

* * * [62]

Q. Did you ever file any legal proceedings?

A. I anticipate that there will be legal proceedings filed with the district court at some point.

Q. And you've been anticipating this since March of 2008?

A. I have been. And part of the reason why it's taken a long time for those of us who are involved in this which is a rather large group of people is that Mr. Melendres has engaged in a campaign on behalf of Mr. Harbour of sending out very threatening letters to people who have -- 20 people who have signed a cover letter asking other members of the public to join the petition.

And that has scared a lot of these people from further involvement. So that has slowed down the gathering of signatures. And this is something that people are doing in their own time.

* * * [70]

Q. And who were your clients at the time that you wrote this letter, who did you represent?

A. On June 11, 2008, I represented most of the people who had signed a cover letter asking other

[71]

people to sign the petition. I think it's 18 out of 20 people.

Q. And did you have a retainer agreement with them?

A. Not a written retainer agreement, no.

Q. Had they paid your retainer fee?

A. No.

Q. And what did they retain you to do?

A. These people and -- I'll tell you who they

are specifically as soon as I can find it. It's Exhibit II in my binder. And many of these people had received one or more threatening letters from Mr. Melendres.

And they had called me because when they were -- we were gathering -- getting organized and people were signing this cover letter to the petition which is my Exhibit HH, the previous page, we had talked about what might happen and all that.

And I had told them that if they were threatening any kind of a defamation action, that I would be happy to provide legal services if it came to that. And after I don't know how many letters Mr. Melendres had sent out, at least six or eight, probably eight of these people had contacted me complaining about letters they had received,

[72]

which letters I will say in my opinion are unethical on several fronts; but I have not filed any complaints or anything.

And one of the -- two of the people specifically asked me to contact Mr. Melendres on their behalf. And I sent him a letter on their behalf. And then Mr. Melendres continued to send out additional letters threatening people.

MR. ROTHSTEIN: I think you've answered the question.

BY MR. WIDMAN;

Q. Who were these people?

A. And then I sent him a follow-up letter and he stopped at that point.

Q. Who are these people on behalf of who you wrote to Mr. Melendres?

A. I wrote to him on behalf of myself and everybody except for Miguel Santistevan. And I'm

looking at my exhibit marked H.

* * * [92]

MARIE WILKINSON

after having been first duly sworn under oath,
was questioned and testified as follows:

EXAMINATION

BY MR. WIDMAN:

* * * [99]

Q Okay. Now I'm going to show you what has been marked for identification as Exhibit 10, which is a document entitled Affidavit of Marie Wilkinson.

MR. CONVISSER: You may be referring to Exhibit 11 or what's been marked in my file as Exhibit 11.

MR. WIDMAN: I'm sorry. Yeah. Exhibit 11, right. Thanks.

MR. CONVISSER: I object to the witness seeing this document. It's obviously some kind of a hearsay document that the witness has marked up prior to her hearing testimony today and therefore, it's also leading.

MR. ROTHSTEIN: I haven't heard a question yet so let me reserve your objection until I hear the question that's being asked.

[100]

MR. CONVISSER: Okay.

BY MR. WIDMAN:

Q Ms. Wilkinson, Exhibit 11 is a document entitled Affidavit of Marie Wilkinson that has some green markings on it and some either pink or red markings. I'm a little color-blind; is that correct?

A That's correct.

Q And who placed those markings on the

document?

A. I did.

Q. And what do those markings signify?

A. They indicate things that either I did not say, which are in red, or things that I did not know, which are in green.

MR. WIDMAN: I offer Exhibit 11 into evidence.

MR. CONVISSER: I object.

MR. ROTHSTEIN: Your objection is?

MR. CONVISSER: It's a hearsay document. Mr. Widman should be eliciting testimony on direct examination of the witness, not allowing her to summarize her testimony in a prewritten statement like this.

MR. ROTHSTEIN: She's in court or a hearing and you do have the opportunity to cross-examine her.

[101]

I'm not clear what the hearsay is.

MR. CONVISSER: Okay.

MR. ROTHSTEIN: It's not something that was told to her by somebody else.

MR. CONVISSER: All right. It's more that it's a leading document, that she has created this outside the scope of direct examination and testimony here.

MR. ROTHSTEIN: I'm going to overrule your objection, it will be admitted.

(Exhibit 11 admitted.).

BY MR. WIDMAN:

Q. Ms. Wilkinson, did you ever --

MR.ROTHSTEIN: One clarification. There's handwriting on the document. Would you clarify who the handwriting is, the initials NS.

BY MR. WIDMAN:

Q. Now, at the top of the document, there are some notations. Do you know whose handwriting that is?

A. They're your handwriting. The colors are mine. The green and the red squares are mine and the

* * * [102]

EXAMINATION

[103]

BY MR. CONVISSER:

* * * [132]

Q. And Mr.Harbour reacted negatively to your proposal, correct?

A. Yes.

Q. And, in fact, you were quite taken aback by his reaction, weren't you?

A. Yes.

Q. And is it fair to say that he lost his temper with you and that's what?

Q. No.

MR. ROTHSTEIN: Can I ask you to rephrase the question in terms of whether she told you that those things happened, not whether, in fact, they happened.

* * * [133]

MR. ROTHSTEIN: What I would prefer that you do is read her the sentence and ask her if she told you that.

MR. CONVISSER: Well, I'm getting -- again these sentences are all -- they have different parts to them. And I never, never, ever suggested that she said to me this exact sentence. This is --

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MR. ROTHSTEIN: You can testify to that in

your testimony. I'm asking you in terms of conducting cross-examination to direct her to a specific sentence in the affidavit and ask her if she told you that.

MR. CONVISSER: I object to being direct to ask multiple compound questions.

MR. ROTHSTEIN: You're not being asked to do so. You may proceed.

MR. CONVISSER: I would like to break down the question into individual components of each sentence. May I do that on cross-examination?

MR. ROTHSTEIN: I'll let you do this first. To lay a foundation for it, you can ask her if any portion of the sentence is accurate.

BY MR. CONVISSER:

Q. Okay, Ms. Wilkinson, referring to -- I'm going to read you a sentence. And will you tell me which portions of tis sentence is accurate.

MR. ROTHSTEIN: Meaning that you told him the things that he's going to say.

BY MR. CONVISSER:

Q. Correct. Here's the sentence: "I was scared of his" Mr. Harbour's "angry verbal attack upon me and his accusations.."

A. No portion of that is correct.

[135]

Q. Okay. Let's take the word verbal.

MR. ROTHSTEIN: She's answered the question. You can go on to another sentence.

MR. CONVISSER: May I attempt to impeach with regard to that portion of the sentence?

MR. WIDMAN: Objection. She's already stated --

MR. ROTHSTEIN: She said no portion of this

was correct.

* * * [137]

BY MR. CONVISSER:

Q. Ms. Wilkinson, looking at the bottom of that page, we did not communicate in December of 2007, correct?

A. Correct.

Q. Okay. And is it correct that the core faculty members resigned in December of 2006?

A. Yes.

Q. Rather than 2007. That's the bottom of paragraph 19.

MR. WIDMAN: Objection. I ask that the question and answer be stricken. There's nothing in there regarding resignation of core faculty members as underlined. What's underlined is the date.

MR. ROTHSTEIN: Sustained.

BY MR. CONVISSER:

Q. Ms. Wilkinson, did we talk about the fact that there were renovations undergoing at EcoVersity?

MR. WIDMAN: Objection again to the form of

[138]

the question. Mr. Convisser has been instructed to refer specifically to the statement in the affidavit to which he's referring and to ask the witness whether or not she made that statement.

MR. ROTHSTEIN: Mr. Convisser, I just want to make it very clear if you're going to ask her everything that might be truthful that's not denied in the statement, we could be here for months covering a lot of ground that's not germane in the specification of charges.

The things that are germane to the specification

of charges is the statements she contends she did not make to you. So the only question here is did she make the statement to you.

MR. CONVISSER: I think that was the question.

MR. ROTHSTEIN: Well, you can read the statement that's attributed to her and ask her if she made the statement to you.

MR. CONVISSER: Okay. May I ask the reporter to repeat the question. This is with reference to the last sentence of paragraph 20.

MR. ROTHSTEIN: No, ask another question.

BY MR. CONVISSER:

Q. Okay. Ms. Wilkinson, did you state to me

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that Mr. Harbour had started renovations on EcoVersity, building renovations, without first securing necessary permits?

A. No.

Q. What was our conversation concerning --

MR. WIDMAN: Objection. It doesn't matter what the conversation was. The issue is whether ornot she said it, and she has already said she didn't.

MR. ROTHSTEIN: Sustained.

* * * [141]

Q. And, Ms. Wilkinson, did you tell me in reference to paragraph 21 that even while you were on the board with Mr. Harbour and Mr. Clark, you were not comfortable in knowing what they were up to?

MR. WIDMAN: Objection. The statement is "Even when I was never confident that I knew exactly what they were up to." And the appropriate question was whether or not she said that.

MR. ROTHSTEIN: Sustained.

MR. CONVISSER: I'm going to simply object for the record that I'm being denied an opportunity to cross-examine and explore areas of impeachment.

* * * [146]

MR. ROTHSTEIN: The question is just the way you have it in paragraph 22. Did you make that statement.

THE WITNESS: I did not make that statement.

BY MR. CONVISSER:

Q. What is not true – what are you saying in

[147]

the first sentence of paragraph 22 that you did not say to me?

A It is not information that I would have volunteered. There was no official accusation.

Q. I'm going to ask you to answer the question. It's not whether you would have or would not have. It's whether you did.

A. Okay. Then I didn't. I did not say to you out of the blue I am aware that George Clark was accused, et cetera.

Q. And what in that sentence are you saying that you did not tell me, what words in that sentence did you not tell me, what part of that sentence?

A. All of it, the whole sentence I would not have said to you.

Q. Are you saying that we never had a conversation about George Clark being accused of -- or under suspicion for dealing marijuana to an underage staff member?

MR. WIDMAN: Objection.

MR. ROTHSTEIN: Sustained.

MR. WIDMAN: The issue is not whether

they ever had a conversation.

MR. ROTHSTEIN: Sustained. She answered the

[148]

question. She answered the question, she said she did not say that.

MR. CONVISSER: Well, she didn't -- she testified that she didn't say the sentence. But I don't think she's answered the question about whether we had a conversation about this topic.

MR. ROTHSTEIN: It doesn't matter whether you had a conversation about the topic. The question is whether or not the sentence in the affidavit is accurate.

MR. CONVISSER: May I inquire as to the specific portion of the sentence as to whether she told me?

MR. ROTHSTEIN: She said she didn't tell you any of it.

MR. CONVISSER: Because it's a compound sentence that has many parts to it.

MR. ROTHSTEIN: Her testimony is that she did not tell you any of it.

MR. CONVISSER: And I followed up with a question as to one specific part of it, as to whether we ever had a conversation with about whether George Clark had dealt marijuana.

MR. WIDMAN: And the objection to that has been sustained.

[149]

MR. ROTHSTEIN: I'll sustain the objection on relevance grounds as well.

MR. CONVISSER: May I ask if she is aware that others have made an accusation about George

Clark in that regard?

MR. WIDMAN: Objection.

MR. ROTHSTEIN: Are you saying that you put in the affidavit that she told you that?

MR. CONVISSER: I did put that in there because she told me. But she's also aware that others have made that accusation.

MR. ROTHSTEIN: That's not in the affidavit.

MR. CONVISSER: It's stated in the passive tense, that George Clark was accused. It doesn't say that she accused him.

MR. ROTHSTEIN: We're not going into the truth of the matter of whether or not George Clark was accused. The question is did she say it to you. She has said she did not say any part of the sentence to you. Whether you know it from another source, whether she knows it from another source doesn't matter as long as she didn't say it to you.

MR. CONVISSER: It's whether others -- because it's written in the passive tense. That's the only reason why I'm persisting with this question as

[150]

to whether others told her -- whether she told me that others had made her aware of an accusation against George Clark.

MR. WIDMAN: She says she didn't say the sentence. I think that closes the matter.

MR. ROTHSTEIN: I think that's the end of it.

* * * [275]

THOMAS ENOS,

after having been first duly sworn under oath,

was questioned and testified as follows:

EXAMNATION

BY MR. CONVISSER:

* * * [280]

Q. I understand that. Can you describe the times that we've met involving this matter.

A. Well --

MR. WIDMAN: Objection as to the characterization of this matter.

BY MR. CONVISSER:

Q. Involving EcoVersity and the subject matters that we've discussed and worked together on since June or July 2007.

A. So just in general?

Q. Yeah.

A. Oh, it related basically to the background information that's here in the petition and just to talk about who -- some of the history. I was involved for quite a long time in this organization.

And discussing what I did and my involvement with Ms. Harwood and other people that I knew and that I was involved with in the school. And basically some of the events that transpired over the history, both before and after -- well, while she was alive and after she passed away. And basically that.

Q. And with respect to your involvement in the petition itself, have you been involved in activities other than gathering petition signatures?

A. Yeah. Well, yeah.

[281]

Q. Okay.

A. I mean around that.

Q. Can you state what they were around that.

A. Yeah, I mean basically speaking to or contacting previous students or people involved with EcoVersity, contacting them, letting them know my

concerns and our concerns, the people who signed the petition, basically doing some mailing, letters, you know, regarding that issue.

And speaking to people in general even if they were signing the petition, yes. If not, you know, just talking to them about the issues involved and hearing their concerns in, you know, public places, privately, so forth.

Q. As far as you have observed, have there been other people involved in a like manner to yourself?

A. Oh, yeah, uh-huh, yeah.

Q. And have you been to meetings where others have been working on these matters?

A. Yeah, sure.

Q. Okay. And more than one meeting?

A. Yeah.

* * * [282]

Q. And do you recognize Exhibit LL as a letter that is address to you and that you received?

A. Yeah, uh-huh.

Q. And it's signed by whom at the back?

A. There it is. Walter Melendres.

Q. And did you contact me in response to your receiving this letter?

A. Yes.

Q. And what was your reaction when you received the letter in the first instance?

Mr. Widman: Objection as to his reaction, it's irrelevant.

MR. ROTHSTEIN: What's the relevance?

BY MR. CONVISSER:

Q. Okay. Why did you contact me after receiving the letter?

A. Oh, I was just -- you know, I was concerned about any -- some of the details in the letter. And I didn't think they were necessarily all, you know, truth the way I saw them. And I was concerned, you know, that -- about my -- you know, to understand my involvement, you know, what exactly what my -- I knew what my role was.

[283]

But, you know, someone else's role and interpretation was written in this letter. So I was contacting you regarding that. And you're an attorney so I figured, well, you know, you understand that kind of thing.

* * * [284]

Q. And, Mr. Enos, did I provide you legal advice or service in response to your contacting me in response to this letter that you received?

Yes.

MR. WIDMAN: Objection. I ask that the answer be stricken.

MR. ROTHSTEIN: I'll let him testify that the he retained Mr. Convisser as his attorney.

BY MR. CONVISSER:

Q. And, Mr. Enos, you didn't pay me any money, did you?

A. No.

* * * [300]

LAURA ELIZABETH GOMEZ

after having been first duly sworn under oath, was questioned and testified as follows:

EXAMINATION

BY MR. CONVISSER:

* * * [306]

Q. Okay. And did you have occasion to

speak to me before -- first of all I told you when this bar complaint was filed?

A. You did.

Q. And you submitted a letter to Virginia Ferrara in support of me and my character?

A. That's correct.

Q. And my character?

[307]

A. Absolutely.

Q. And I'll ask you to flip open that binder there in front of you. And it's about probably three-quarters of the way through, but there's an exhibit marked at the bottom which is Exhibit Q. It's about three-quarters of the way back. If you look to the tabs, it's going to be after the tab of N.

A. Okay. I see a T tab. Is it in between? Oh, there we go. Okay. I've got it.

Q. Okay. And is this the letter that you sent to Virginia Ferrara in response to the filing of the bar complaint?

A. Yes, it is.

Q. And the date on this letter is June 6, 2008?

A. That's correct.

Q. And I informed you of the complaint perhaps a week or two before that; is that fair to say?

A. I would guess that's the case, yes.

Q. And before that happened, had you and I ever had a conversation about whether I was qualified to teach at the University of New Mexico School of Law?

A. Yes. Based on our conversations over many years about your legal practice and including -- including your own -- your own practice but also

including the ethics seminars you had done for the

[308]

Virginia bar, CLEs and the like, I suggested that I thought you would be a great ethics teacher and that you should consider whether you might want to do that as an adjunct at UNM.

* * * [310]

EXAMINATION

BY MR. WIDMAN

* * * [321]

Q. Now, would the fact that Mr. Convisser submitted this affidavit without ever showing it to Marie Wilkinson change your opinion as to his ethics?

MR. CONVISSER: Could you give the chance to read at least the first page of the document.

THE WITNESS: Well, I don't know because it says at the top "Marie Wilkinson has not reviewed this affidavit." And I noted that at pages 3 and 4, it distinguishes between affidavits and unexecuted statements.

Volume 2

April 17, 2009

EXAMINATION PRO SE

* * * [390]

MR. CONVISSER: Okay. I did testify that I was -- and the understanding upon sending off my completion of my CLE hours on March 22nd [sic -- should be March 20th] that I had a communication with the bar on the phone the next day or the day after that and was told that my license in Virginia was fully -- you know, that it was going to be active.

* * * [410]

EXAMINATION

BY MR. WIDMAN:

* * * [421]

Q. So it's your understanding a litigation that has not been filed is pending litigation?

[422]

A. There is a petition being circulated. As I said it's not actually been filed. So it's out there and it's waiting to be filed.

Q. Waiting to be filed?

A. By probably -- I mean on behalf of more than 2,100 people who have signed the petition. I would probably be the one who would actually file it in the court.

Q. Okay. And that's a petition [] to convene a grand jury?

A. Yes.

Q. So you're going to do that all by yourself; is that your testimony?

A. No. I would file the petition. Article 2, Section 14, of the New Mexico constitution says that the district court shall convene a grand jury investigation upon receipt of -- something along these lines, upon the receipt of a petition signed by 2 percent of the registered voters of a county in New Mexico. It's either 2 percent or some other threshold.

So it would be the court to validate the petition and convene the grand jury if the court

[423]

determined that the petition were -- provisions of Article 2, Section 14, had been met. And that's a right given to any citizen in New Mexico. I'll tell you, it was not my –

* * * [437]

EXAMINATION

BY MR. KOZELISKI:

* * * [442]

THE WITNESS: * * * Once Mr. Harbour and Mr. Melendres filed the bar complaint against me, I'm in a position of having defend myself.

And I had already participated with many other people in organizing the petition and campaign and had to continue doing that, if necessary I mean not that I didn't want to or didn't think that it was a worthy community service to bring these issues to light.

* * * I literally was reading the rules of professional conduct and looking for cases, annotations, to see how those rules were interpreted. And it was my understanding from those rules that if I was licensed in another state and there was a potential proceeding, it doesn't say a potential court action, it says a potential proceeding, and if I had associate counsel here who would actively participate

[443]

should the matter become actively going on, that I was correct in what I was doing.

* * * And I believed I was within the four corners of the rules of professional conduct.

(2)

No. 09-1553

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

CLAUDE DAVID CONVISSER, ESQ.,

Petitioner,

v.

DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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PETITIONER'S MISSTATEMENTS OF QUESTIONS PRESENTED

1. Petitioner's statement that the New Mexico Supreme Court violated his First Amendment rights by imposing discipline for his petitioning activity is not true and has no basis in fact. Similarly, petitioner's statement that a reviewing officer ordered charges to be filed because of her objection to Convisser's petitioning activity is an outright falsehood.

2. Petitioner's statement that disciplinary counsel engaged in vindictive prosecution has no basis in fact. Similarly, disciplinary counsel's recommendations of disbarment were based on petitioner's repetitive acts of misrepresentation and outright dishonesty which continue unabated. There is no credible reason why disciplinary counsel would want to punish respondent for his petitioning activity or become involved in that issue and none has been advanced.

3. Petitioner's assertion that he was selected for prosecution because of the exercise of his First Amendment rights is not true and has no basis in fact.

4. Petitioner's assertion that the New Mexico Supreme Court impaired his substantive due process rights has no basis in fact.

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STATEMENT OF THE CASE

Perhaps the most difficult task in the practice of law is responding to arguments that contain half-truths, misrepresentations and the utilization of matters out of context for it compels the responding attorney to spend time and space correcting the matters presented instead of dealing with the case on its merits. Unfortunately, this case presents such a situation in that the truth does not appear to be a constraining factor on petitioner.

This matter arises out of a complaint filed with the Disciplinary Board of the Supreme Court of New Mexico by Jeff Harbour, an officer and board member of EcoVersity, an institution teaching sustainable living and Prajna Foundation, its funding source. Frances Harwood, who died in 2003, was the founder and benefactor of EcoVersity and Prajna. The complaint arose primarily from a meeting between Harbour and petitioner in April 2007, held at petitioner's request. In the course of the meeting, petitioner advised Harbour that the Estate of Frances Harwood had not been properly closed, that Harbour, as executor could still be sued for breach of fiduciary duties in connection with the administration of the estate and that the will appeared to have been procured as a result of Harbour's undue influence. Petitioner further stated that he represented clients who were prepared to join in a lawsuit against Harbour but that if Harbour would turn over control of EcoVersity and Prajna to petitioner, the claims would not be pursued.

At the time of the meeting, petitioner was not admitted to practice in New Mexico and did not represent anyone with standing to sue Harbour. Contrary to petitioner's statements to Harbour, the estate was properly closed. Prior to the meeting, petitioner tried unsuccessfully to convince Sybil Harwood, Frances Harwood's sister, to retain petitioner to sue Harbour and mailed her a retainer agreement. At the time of the solicitation of Sybil Harwood, petitioner was not yet admitted to practice in New Mexico and was on inactive status in Virginia.

Subsequent to the review of this matter by a reviewing officer, a four count Specification of Charges (Petitioner's Appendix I) was filed. Count I alleges that petitioner misrepresented to Jeff Harbour (the complainant) and the Attorney General that the Estate of Francis Harwood had not been properly closed and that the statute of limitations on a claim against Harbour for breach of fiduciary duty against Harbour as executor had therefore not run.

The hearing committee, consisting of two attorneys and one lay member appointed by the disciplinary board, found with respect to Count I that petitioner's misrepresentations violated Rule 16-804(C) NMRA prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation.

Count II alleges that respondent violated Rule 16-505(A) NMRA by engaging in the unauthorized practice of law in connection with his solicitation of Sybil Harwood and his meetings with Harbour. The

hearing committee found that respondent's conduct violated Rule 16-505(A) NMRA.

Count III alleges that petitioner violated Rules 16-804(C) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 16-804(H) (conduct adversely reflecting on petitioner's fitness to practice law) by falsely stating to Harbour that he represented clients or claimants with standing to sue when in fact he did not represent anyone with standing. The hearing committee found that petitioner did not in fact represent anyone with standing to sue and that his statements violated Rule 16-804(C) NMRA.

Count IV alleges that petitioner violated Rules 16-804(C) and 16-804(H) NMRA by using an unsigned affidavit in connection with a complaint filed with the Attorney General and referring to the affidavit as if it were signed. The hearing committee found that respondent's use of the unsigned affidavit violated Rule 16-804(C).

The foregoing findings were affirmed by a hearing panel consisting of three members of the Disciplinary Board. Where the hearing panel departed from the recommendations of the hearing committee was in the recommendations for discipline. The hearing committee recommended that petitioner be suspended for an indefinite period with reinstatement subject to a mental health evaluation as to petitioner's ability and fitness to practice law. The hearing panel recommended a one-year suspension with the requirement of a mental health evaluation and

imposed additional requirements regarding the evaluation. The hearing panel also imposed a period of supervised probation following petitioner's reinstatement.

Upon review of this matter by the New Mexico Supreme Court, the Court ordered that petitioner be suspended for one year, that the suspension be deferred on condition that petitioner observe and comply with all Rules of Professional Conduct and Rules Governing Discipline and that petitioner respond in a timely manner to any complaints filed against him and to requests from disciplinary counsel for additional information.

REASONS TO DENY WRIT

A. Petitioner's constitutional arguments are based on deliberate misstatements of the record

Petitioner's argument, that he was prosecuted for petitioning under Article II, Section 14 of the New Mexico Constitution, has no basis in fact. Petitioner was prosecuted because of the conduct he engaged in as alleged in the Specification of Charges, which conduct is undisputed. Petitioner misstates the record when he attributes the prosecution of this matter to the "animus" of the reviewing officer when the reviewing officer has clearly stated that respondent's attempt to carve out a role for himself as exemplified

by his petitioning activity is a matter best left for the courts. Petitioner's Appendix I, p.43a.

Finally, there is no credible reason why disciplinary counsel would want to punish petitioner for his petitioning activity or become involved in that issue and none has been advanced.

B. There was no vindictive prosecution in this case

Petitioner's argument of vindictive prosecution is based on the discipline requested, rather than the decision to prosecute itself. Clearly, disciplinary counsel's request that petitioner be disbarred is not too far off the mark since the hearing committee recommended indefinite suspension and the hearing panel suggested suspension for one year.

It is significant that the recommendations of both the hearing committee and the hearing panel that respondent undergo a mental health evaluation were not made at the instance of disciplinary counsel but, rather, were based on their own observations of petitioner in the course of the hearings and oral arguments.

C. The findings of fact are supported by substantial evidence

Petitioner argues that in reaching its decision the New Mexico Supreme Court ignored many facts that were admitted in evidence. In reviewing a substantial

evidence claim, the reviewing body does not look to see whether substantial evidence exists to support the opposite result, but whether such evidence supports the results reached. *In re Bristol*, 2006-NMSC-041, ¶16.

Petitioner has failed to demonstrate that the findings of fact were not supported by substantial evidence.

D. Petitioner's allegations of *ex parte* communications have no basis in fact and should be rejected out of hand

Petitioner speculates that the recommendation of the hearing committee that he have a mental health evaluation is a result of *ex parte* communications between the hearing committee and disciplinary counsel. Other than to say that respondent has apparently not considered that the recommendation is a result of his behavior, this argument is based solely on petitioner's imaginings and merits no further response.

E. There was no failure to notify petitioner of the charges against him

The hearing committee's conclusions of law (Petitioner's Appendix C) as set forth in paragraphs 20, 21, 22 and 23 track the allegations in Counts I, II, III and IV of the Specification of Charges. Petitioner has not been found to have violated any Rules not contained in the Specification of Charges nor were the

findings of Rules violations based on conduct not alleged in the Specification of Charges.

F. Petitioner had the opportunity to and did in fact conduct significant discovery in this case

Notwithstanding petitioner's contentions to the contrary, he conducted significant discovery in this case. First, pursuant to disciplinary counsel's open file policy, petitioner inspected disciplinary counsel's entire file (with the exception of work product) and copied significant portions of it. Petitioner deposed Walter Melendres, complainant's attorney, Jeff Harbour, the complainant, Amy Pilling, Diane Garrity and Marie Wilkinson. In addition to calling petitioner as a witness, disciplinary counsel called Mr. Harbour and Ms. Wilkinson. Thus, respondent not only inspected whatever documents were contained in disciplinary counsel's file but deposed all of the witnesses called by disciplinary counsel at the hearing of this matter.

CONCLUSION

In an effort to invoke the interest of this Court, petitioner has created constitutional issues where none in fact exist. There is simply no basis in the record for arguing, much less concluding, that petitioner was prosecuted for exercising his First Amendment rights or that he was denied due process or

equal protection of the law. Accordingly, the Petition should be denied.

Respectfully submitted,

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(3)

No. 09-1553

IN THE

SUPREME COURT OF THE UNITED STATES

CLAUDE DAVID CONVISSER,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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JAN 13 2010
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Petitioner Claude D. Convisser ("Mr. Convisser") respectfully files this supplemental brief pursuant to Rule 15.8 in support of his petition for writ of certiorari ("Petition") filed June 21, 2010.

SUPPLEMENTAL OPINION BELOW

On July 13, 2010, the New Mexico Supreme Court issued an opinion in this case ("the opinion"), which it will publish. *In the Matter of Convisser*, N.M. S. Ct. No. 32,019 (slip op. July 13, 2010) ("the opinion"). The opinion is printed in Appendix FF to this brief. App. 135a.

SUMMARY OF SUPPLEMENTAL ARGUMENT

The New Mexico Supreme Court's opinion opens the door to establishing a criminal enclave in New Mexico by subjecting lawyers to a new disciplinary hazard for volunteering information in good faith to law enforcement authorities. It also deters lawyers from engaging in fruitful, informal settlement communications with party opponents by subjecting them to discipline based on the accusation of verbal misrepresentation by an adverse party. To collar the hearing committee's findings of Mr. Convisser's conduct into a disciplinary infraction, the New Mexico Supreme Court invents a nonsensical and inapplicable distinction between an intentional, affirmative misrepresentation with fraudulent intent and one without such intent. The Court bases the remainder of its findings and conclusions on an unreasonable reading of the record and the law, all of which has the real and underlying purpose of sanctioning Mr.

Convisser for his petitioning and assistance to others to petition.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

Mr. Convisser's petitioning has touched the third rail of New Mexico political and legal culture: a toleration of fraud and corruption unlike any in the other 49 states, all of whom, save Alaska and Hawaii, preceded New Mexico into the Union. The New Mexico Supreme Court bends over backwards to the point of issuing an opinion purported to guide future attorney conduct (App. 136a) that works to the benefit of criminals and the detriment of lawyers seeking transparency and honesty. The winner is a person presumed to have committed undue influence under New Mexico law[1] who has used some of his proceeds acquired by fraud to hire a powerful and well-connected law firm within the state to defend him. The losers are law-abiding citizens who petitioned their state government for redress of grievances under the First Amendment and the lawyer who has been assisting them *pro bono*.

---

[1] *Montoya v. Torres*, 823 P.2d 905, 910 (N.M. 1991) (presumption of undue influence arises when holder of a position of confidentiality vis-a-vis the testatrix helps to procure the will and additional suspicious circumstances are present, such as testatrix's reduced capacity due to morphine; complaining witness Harbour was Frances Harwood's tax preparer).

I The Opinion of the New Mexico Supreme Court Endangers Federal and State Law Enforcement in New Mexico.

On specious grounds set forth below, the New Mexico Supreme Court has imperiled any lawyer who seeks to provide information to federal or state law enforcement in New Mexico, whether as an informant like Mr. Convisser was to the New Mexico Attorney General[2] or on behalf of a client, which client may be a cooperating witness or a criminal defendant engaged in plea negotiations. The threat is that the lawyer's communications with law enforcement will cause him to run afoul of the opinion disciplining Mr. Convisser, on grounds of misrepresentation, for communicating in good faith with the New Mexico Attorney General.

This precedent will undoubtedly deter some lawyers from providing information as an informant or on behalf of their clients to prosecutors or the police. It will strengthen the hand of criminals by chilling the informal communications between lawyers and the authorities, the proffering of witness testimony, that grease sound enforcement of the law. This opinion takes a step towards creating a sanctuary along the Mexican border where law enforcement is enfeebled due to the reluctance this opinion will instill in lawyers

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[2]Since EcoVersity and Prajna Foundation, the residual beneficiaries of Frances Harwood's estate, were non-profit charitable organizations regulated by the New Mexico Attorney General, this officer had legal authority and standing to petition the state district court to re-open the probate of France Harwood's will on grounds of fraud. NMSA 57-22-9 (1978) (App. 171a). However, he declined to investigate due to a lack of resources.

to communicate forthrightly with authorities about witness knowledge and testimony.

Witnesses to criminal activity are notoriously fickle. They change their stories as time passes, depending on whom they are speaking to, for any of a variety of reasons or for no reason at all. Following this opinion, what lawyer will ever be willing to risk his or her neck by informing federal or state law enforcement authorities in New Mexico about criminal wrongdoing? If the lawyer's account includes any description of witness testimony and the witness ultimately recants or presents testimony differing from the lawyer's advance description of it, the lawyer will be vulnerable to an ethical charge of misrepresentation. Prudent lawyers will conclude that a license to practice law is too precious to risk on aiding their clients by passing information to a prosecutor or the police. Prosecutors will not be able to count on investigative cooperation from private members of the New Mexico Bar. If a haven for criminals takes root, criminals will race to the bottom to exploit New Mexico's lax environment and make it a locus of criminal activity in the United States.

II The Opinion of the New Mexico Supreme Court Is Contrary to Public Policy That Encourages the Settlement of Legal Disputes and the Hiring of Legal Counsel.

The New Mexico Supreme Court undermines strong public policy by disciplining Mr. Convisser for his attempt in April 2007 to find a compromise settlement of a legal dispute with complaining witness Harbour. This precedent creates an unfortunate

disincentive to the resolution of legal disputes by informal means. No lawyer will be willing to conduct information exchange or settlement discussions if he or she fears that an adverse party or lawyer may file and succeed with a complaint for misrepresentation based their conversation. In addition, the unauthorized practice of law finding against Mr. Convisser for merely transmitting a draft contract for legal services introduces an element of ambiguity and uncertainty into the formation of the attorney-client relationship.

III The New Mexico Supreme Court's Reasons for Disciplining Mr. Convisser Are Pretextual Surrogates for the Real Intent to Punish Him for and Deter Him and Others from Petitioning.

The opinion ignores the crucial justification for the prosecution, most aptly expressed by deputy disciplinary counsel Joel L. Widman ("Mr. Widman") to the disciplinary board panel, that Mr. Convisser's petitioning was "certainly not the conduct we want to see in somebody admitted to practice law in New Mexico." App. 107a. It omits mention of the recommendation of the hearing committee tailored to keep Mr. Convisser from assisting others to exercise their First Amendment right to petition their state government for redress of grievances. (App. 23a (¶ 39(B)).

The New Mexico Supreme Court's repeated justification of discipline based on the hearing committee's finding that "neither [Mr. Convisser] nor any of his purported clients had ever brought a civil action against [Mr. Harbour]" is disingenuous. App. 156a, 160a, and 161a. As the Court was aware from

notice provided by Mr. Convisser, after conclusion of the disciplinary hearing, he filed the Rescue EcoVersity petition with the state district court on behalf of several thousand petitioners seeking a grand jury investigation. *In re. Rescue EcoVersity Petition*, N.M. Ct. App. No. 30,100 (appeal filed on Nov. 20, 2009 from dismissal of N.M. 1st Jud. Dist. Ct. No. D-0101-CV-200902377).

Rather than recognizing the unconstitutional intent of its disciplinary officials to discriminate against Mr. Convisser's petitioning and assistance to others to petition, the New Mexico Supreme Court embraces the result of discipline and reaches for grounds to justify it. The Court accomplishes these ends by devising an unprecedented formulation of misrepresentation to fit Mr. Convisser, and more broadly, by adopting findings and conclusions that do not reasonably accord with the record.

A The Conclusion that Mr. Convisser Engaged in Misrepresentation Is Based on a Legal Fiction Invented by the New Mexico Supreme Court.

An appellate panel in a New Mexico lawyer disciplinary proceeding may not substitute its own findings of fact for those of the hearing committee. *In the Matter of Bristol*, 142 P.3d 905, 910 (2006). The hearing committee found that Mr. Convisser "should have known that the estate [of Frances Harwood] was properly closed and that the statute of limitations for actions against the personal representative had expired." App. 12a (¶ 6) (emphasis added). Despite this statement of a simple negligence standard, the

New Mexico Supreme Court unreasonably interpreted this paragraph as follows: "the hearing committee believed that [Mr. Convisser] knew that the limitations period had expired, [and] that he intentionally misrepresented that the limitations period had not expired." App. 155a (emphasis added).

That Court re-wrote the hearing committee's finding of Mr. Convisser's *mens rea* because it had to in order to obtain a finding of guilt on these misrepresentations, as follows. That Court previously held that a finding of lawyer misrepresentation under Rule 16-804(C) NMRA cannot be premised on negligent conduct, but must be intentional. App. 147a-148a (citing to *Bristol*, 142 P.3d 905). By re-defining Mr. Convisser's misrepresentation from being negligent to intentional, the Court moved a step towards affirming that Mr. Convisser violated engaged in professional misrepresentation.

A hurdle, however, remained. The hearing committee only found that there was proof by a preponderance of the evidence of Mr. Convisser's misconduct.. App. 19a, ¶ 25. New Mexico caselaw prior to the instant opinion had always grouped lawyer misrepresentation with dishonesty and fraud in requiring proof by clear and convincing evidence to justify a disciplinary infraction. *Bristol*, 142 P.3d at 910; *In the Matter of D'Angelo*, 733 P.2d 360 (N.M. 1987). To overcome this bar, the New Mexico Supreme Court had to reconcile its fabrication of an intentional misrepresentation with the hearing committee's finding of proof by only a preponderance of the evidence.

The Court accomplished this feat by imposing discipline on Mr. Convisser for committing "intentional misrepresentations without fraudulent intent" (App. 148a) requiring proof by merely the preponderance of the evidence. The trouble with this approach, though, is that the distinction between an intentional misrepresentation with, versus without, fraudulent intent is so novel as to not have any parallel in American law.

Fraud in New Mexico requires that "the representation was made with the intent to deceive and to induce [reliance]." Uniform Jury Instruction - Civil 13-1633 (NMRA) (App. 172a). Any fair reading of the hearing committee's findings points to its conclusion that Mr. Convisser intended, by the affirmative statements Mr. Harbour attributed to him in hearing testimony, to deceive Mr. Harbour into believing that he was representing a client at their meeting of April 24, 2007. The hearing committee seems to have found that Mr. Convisser's intent was fraudulent, which would require clear and convincing proof. *D'Angelo*, 733 P.2d 360.

The New Mexico Supreme Court hung its hat on Mr. Convisser's *pro bono* service, suggesting that without pecuniary incentive, Mr. Convisser could not have had the fraudulent intent necessary to require proof by clear and convincing evidence.. However, the manner of the attorney's compensation or lack thereof is irrelevant to the question of his intent to misrepresent. It may be that Mr. Convisser is a fool for conducting an unrecorded meeting with an adverse party who was a year later able to file he-said, she-said allegations of misconduct against him in retaliation for

a First Amendment petition drive then underway, but the fact that Mr. Convisser did so *pro bono* should not dictate a lower level of proof needed to find him guilty. If anything, since "a lawyer should aspire to ... provide legal services ... at no fee ... to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights," he should receive the benefit of a higher evidentiary burden. Rule 16-601 NMRA (App. 75a).

The sole case that the New Mexico Supreme Court cited to for its newfound dichotomy between an intentional misrepresentation with, versus without, fraudulent intent is inapposite to the findings against Mr. Convisser. The Oregon Supreme Court distinguished between fraud and a[n intentional] misrepresentation consisting of "an omission of fact that is knowing, false, and material." *In re Obert*, 89 P.3d 1173, 1177-78 (Or. 2004) (*en banc*) (emphasis added) (cited at App. 148a). None of the misrepresentations attributed to Mr. Convisser, however, are in the nature of an omission. All of his supposed misrepresentations were affirmative statements:

> (1) whether the applicable statute of limitations had expired,
>
> (2) whether [he] actually represented any clients who wanted to sue Harbour, and

> (3) whether the purported Wilkinson affidavit was inaccurate. [*sic*]

App. 159a. Thus, the New Mexico Supreme Court's whole cloth construct for disciplining Mr. Convisser for misrepresentation, when the hearing committee's express findings were by a preponderance of the evidence that he made a negligent representation, are beyond the pale of any other court's imagination.

The New Mexico Supreme Court imposed discipline on Mr. Convisser for a distinction that is without a difference on grounds that no other attorney in the United States has ever been subjected to. This constitutes selective prosecution in violation of equal protection or, put another way, pretext to cover the express, manifest intent of disciplinary officials to pursue Mr. Convisser for exercising First and Fourteenth Amendment rights to petition state government.

B. The Grounds for Imposing Discipline Are Based on an Unreasonable Reading of the Record.

The New Mexico Supreme Court upholds the findings and conclusions of the hearing committee if they are "reasonable." *Bristol*, 142 P.3d 905, 910. Their findings and conclusions in the instant case were unreasonable.

It was unreasonable for the New Mexico Supreme Court to impose discipline on Mr. Convisser for telling Mr. Harbour that "(1) Frances Harwood's

estate had not been properly closed [and] (2) the will could be challenged because it had been procured by [Mr.] Harbour through undue influence." App. 137a. Hearing exhibits C-1 to -10 gave rise to a presumption under New Mexico law of Mr. Harbour's undue influence. *Montoya v. Torres*, 823 P.2d 905. Since no party has yet raised this fraud before the probate court, that court's finding that Frances Harwood's will was valid and legally binding was the result of fraud. Any party with standing could move to re-open the probate proceeding on grounds of fraud and claims against Mr. Harbour as personal representative of the estate could be renewed. *See* NMSA 37-1-7 (1978) (App. 170a).

An example of the prejudice caused by the protective order (App. 52a) in preventing Mr. Convisser from challenging Mr. Harbour's credibility on cross-examination was the hearing committee's exclusion from evidence of hearing exhibits RR and SS, an offer and counter-offer to sell real estate dated July 3, 2006. These documents identified Mr. Harbour, in his capacities as personal representative of Frances Harwood's estate and trustee of her trust, as the seller of the real estate. However, this transaction took place one year after the order adjudicating the estate terminated Mr. Harbour's official roles. Since he never asked the probate court to approve this sale, the final resting place of the $151,180.24 in sale proceeds is a mystery. Hearing tr., at 403, lines 1-16; exh.C-10.

When Sibyl Harwood declined the draft attorney-client contract Mr. Convisser sent her after the Virginia Bar told him his Virginia license was active on March 22, 2007, she wrote:

> I'm glad you got in touch with me about this and I certainly appreciate the work you've put in. Let me know if you decide to continue with the case – I might be able to help along the way.
>
> best regards,
>
> Sibyl

Hearing exh. 9.

Mr. Convisser's testimony was uncontroverted that after he met with Mr. Harbour on April 24, 2007, in keeping with Sibyl Harwood's above-referenced interest in preserving her sister Frances's EcoVersity legacy, Sibyl and he entered into a limited, *pro bono* attorney client relationship with the sole objective of securing Mr. Harbour's resignation from EcoVersity and Prajna, in exchange for which Sibyl was willing to sign a release of claims against him. Tr., at at 43, lines 15-19; 371, line 25 -- 372, 12. Thus, Mr. Convisser statement by email message to Mr. Harbour's counsel on May 9, 2007, after Mr. Convisser's April 27 swearing-in to the New Mexico Bar, was truthful that he "faithfully and in good faith presented to Mr. Harbour the claims of at least one client." App. 137a-138a.

The finding that Mr. Convisser intended to mislead the New Mexico Attorney General by submitting the unsigned statement of Ms. Wilkinson is

unreasonable. The legend at the top of the first page (App. 162a) identified Mr. Convisser, rather than her, as the author. It stated in bold print:

> **NOTE: Marie Wilkinson has not reviewed this affidavit. It is based on my notes and recollections of our many phone conversations and our two meetings, stretching from November 2006 to May 2007. She is no longer returning my phone calls because she is afraid of getting caught in the middle of a legal battle.**

Hearing exh. C-5-B, at 1. Mr. Convisser stated three similar disclaimers elsewhere in his submission to the Attorney General.

An attorney with Mr. Convisser's experience in teaching professional responsibility, who, Associate Dean and Professor of Law Laura Gomez testified on cross-examination concerning his conduct, remains "supremely qualified" to teach the subject at the University of New Mexico Law School, would be highly conscious of his ethical obligations and unlikely to act with the kind of nefarious intent attributed to him by New Mexico disciplinary officials.

CONCLUSION

For these supplemental reasons and the reasons advanced in his Petition, Mr. Convisser requests that this Court issue a writ of certiorari to review the judgment of the New Mexico Supreme Court.

Respectfully submitted,

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Pro Se

APPENDIX

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APPENDIX FF

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Opinion Number:

Filing Date: July 13, 2010

Docket No. 32,019

IN THE MATTER OF
CLAUDE DAVID CONVISSER, ESQUIRE

An Attorney Admitted to Practice
Before the Courts of the State of New Mexico

DISCIPLINARY PROCEEDING

Joel L. Widman, Deputy Disciplinary Counsel
Albuquerque, NM

for Petitioner

Claude D. Convisser, pro se
Santa Fe, NM

for Respondent

OPINION

PER CURIAM.

{1} Our Disciplinary Board recommended that attorney Claude Convisser (Respondent) be suspended from the practice of law for engaging in misrepresentations and the unauthorized practice of law in violation of our Rules of Professional Conduct. Neither Respondent nor disciplinary counsel were satisfied with the Disciplinary Board's recommendation, and both sought review in this Court. After permitting supplemental briefing by both parties, and at the conclusion of oral argument, we announced our decision from the bench to suspend Respondent from the practice of law for one year, but conditionally deferred the suspension. We subsequently entered an order memorializing our decision, and both parties filed motions for rehearing that we denied. We now issue this Opinion to further explain our decision and provide guidance for future cases.

FACTUAL BACKGROUND

{2} The misconduct at issue in this case arose out of a dispute between Respondent and officers and board members of two organizations in Santa Fe known as EcoVersity and the Prajna Foundation. The founder and benefactor of both organizations was Frances Harwood, who died in 2003. Upon her death, Jeff Harbour was appointed as personal representative of Harwood's estate. Harbour was also a board member and officer of EcoVersity and the Prajna Foundation. Respondent is a former student of EcoVersity.

{3} On March 22, 2007, Respondent solicited Harwood's sister as a client to pursue claims against Harbour for his alleged mishandling of the Harwood probate. On April 5, 2007, Harwood's sister sent an email to Respondent declining his offer to represent her. During this time, Respondent was not yet licensed to practice law in New Mexico. Although he did have a license to practice law in Virginia, he was on inactive status at the time.

{4} On April 25, 2007, Harbour met with Respondent at Respondent's request. At that meeting, Respondent threatened Harbour with legal action for what he claimed was the mishandling of the Harwood estate. In particular, Respondent claimed that (1) the Harwood estate had not been properly closed, (2) the will could be challenged because it had been procured by Harbour through undue influence, and (3) the statute of limitations had not expired for claims against Harbour as personal representative of the estate. Respondent also represented at the meeting that he had several clients who were prepared to sue Harbour. However, Respondent stated that claims against Harbour would not be pursued if Harbour agreed to relinquish control of EcoVersity and the Prajna Foundation. The following day, Respondent sent Harbour an email threatening a lawsuit, but offering a purported settlement agreement from unidentified claimants. Two weeks later, Respondent sent another email to Harbour's attorney, assuring him that Respondent "faithfully and in good faith

presented to Mr. Harbour the claims of at least one client."

{5} Later that summer, Respondent sent a letter to the New Mexico Attorney General requesting an investigation and legal action to remove the board members of EcoVersity and the Prajna Foundation. Attached to the letter was a document entitled "Affidavit of Marie Wilkinson," which was unsigned. Alhough [*sic*] there was a statement at the top of the affidavit indicating that Wilkinson had not reviewed the affidavit, the letter repeatedly cited the purported affidavit as support for the letter's factual allegations. Respondent represented that the purported affidavit contained a summary of statements Wilkinson had made to Respondent during the course of several conversations. However, it came to light during the disciplinary hearing that Wilkinson had never discussed with Respondent his intention to attach the purported affidavit to his letter to the attorney general. It also became clear at the hearing that the purported affidavit contained numerous statements that Wilkinson either did not make or that set forth information of which she had no knowledge.

{6} Based on the foregoing, a hearing committee of the Disciplinary Board concluded that Respondent had (1) engaged in the unauthorized practice of law in violation of Rule 16-505(A) NMRA, and (2) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 16-804(C) NMRA. The hearing committee also

recommended that Respondent be indefinitely suspended until he underwent a mental health evaluation to assess his fitness to practice law. Upon review by a panel of the Disciplinary Board, the board panel revised the recommended discipline to a one-year term of suspension followed by six months of supervised probation. During the one-year term of suspension, the board panel recommended that Respondent be required to undergo a mental health evaluation to assess his fitness to practice law and to obtain appropriate counseling if recommended by the evaluating psychologist.

{7} Respondent was adamantly opposed to the imposition of any discipline against him for a variety of reasons. In contrast, disciplinary counsel believed that the disciplinary panel's recommendation was not severe enough and failed to hold Respondent accountable for the full range of his misconduct. We address Respondent's arguments and discuss why he should be disciplined. In the course of that discussion, when appropriate, we will pause to address disciplinary counsel's arguments and ultimately discuss why we conclude that a deferred suspension is the appropriate sanction for Respondent's misconduct.

RESPONDENT'S DISCIPLINARY PROCEEDING WAS CONSTITUTIONAL AND AFFORDED HIM DUE PROCESS

{8} At the outset, we address a number of constitutional challenges that Respondent raises in

an effort to question the underlying fairness of his disciplinary proceeding. Respondent's first challenge stems from his request that chief disciplinary counsel conduct an independent review of his case. In response to that request, chief disciplinary counsel sent Respondent a letter informing him that pursuant to Rule 17-307(E) NMRA she had reviewed the file prior to the filing of charges and concluded that there was reasonable cause to believe that Respondent had committed rule violations. She also informed Respondent that she no longer had any authority to intervene in the proceedings because the matter was now before the hearing committee, and noted that Rule 17-307(B) provides that "all doubts shall be resolved in favor of conducting a formal hearing."

{9} Respondent argues that chief disciplinary counsel's reliance on Rule 17-307(B) violated his right to due process. His argument is twofold. First, Respondent contends that by resolving all doubts in favor of conducting a formal hearing, Rule 17-307(B) "is contrary to the fundamental notion of due process that a person is innocent until proven guilty and not civilly at fault until proven liable." Second, Respondent asserts that Rule 17-307(B) is not being consistently applied. Respondent believes that a consistent application of the rule would either result in formal proceedings on nearly every complaint filed with the Board or else the arbitrary pursuit of only some complaints. We do not find either of Respondent's arguments persuasive.

{10} Respondent's contention that Rule 17-307(B) presumes his culpability is misguided. As is the case with both criminal and civil proceedings, Rule 17-307(B) provides that in deciding whether a complaint should be dismissed without a formal evidentiary hearing, the facts alleged in the complaint must be taken as true before deciding whether there is reasonable cause to believe that a violation of the Rules of Professional Conduct has occurred. This is no different than the standard imposed in either a criminal or a civil context for motions to dismiss the initiating pleading. *See N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991) ("A motion to dismiss tests the legal sufficiency of the complaint. In considering a motion to dismiss for failure to state a claim upon which relief can be granted, we must accept as true all well-pleaded facts and question only whether the plaintiff might prevail under any state of facts provable under the claim."); *State v. Wasson*, 1998-NMCA-087, ¶5, 125 N.M. 656, 964 P.2d 820 (recognizing that when considering pretrial motions attacking the sufficiency of an indictment or information, the factual allegations in the State's pleadings are taken as true).

{11} To the extent that Respondent contends that disciplinary counsel is applying Rule 17- 307(B) arbitrarily, his argument is based on unsupported conjecture and a misunderstanding of the handling of disciplinary complaints. First, although Respondent asserts that disciplinary counsel dismisses many more complaints than should be

allowable under Rule 17-307(B), his assertion has no support in the record. *See State v. Reynolds*, 111 N.M. 263, 267, 804 P.2d 1082, 1086 (Ct. App. 1990) ("Matters outside the record present no issue for review."). Moreover, even when Rule 17-307(B) precludes disciplinary counsel from summarily dismissing a complaint, the Rules Governing Discipline still provide for a formal investigation procedure and the possibility of an informal disposition that may avoid the need for the filing of formal charges. *See* Rule 17-307(C) (providing a formal investigation procedure before the filing of formal charges); Rule 17-308 NMRA (giving disciplinary counsel discretion to propose an informal admonition to resolve the matter without the need for a formal hearing). In short, even if most disciplinary complaints do not result in the filing of formal charges, Respondent wrongly assumes that arbitrary or discriminatory enforcement is the cause.

{12} Respondent next argues that he was the victim of selective prosecution because of his involvement in a petition to convene a grand jury to investigate the operation of EcoVersity. *See* N.M. Const. art. II, § 14 (providing registered voters with the right to petition the district court to convene a grand jury). We assume without deciding that the affirmative defense of selective prosecution is available to a respondent-attorney in a disciplinary proceeding. *Cf. State v. Estrada*, 2001-NMCA-034, ¶12, 130 N.M. 358, 24 P.3d 793 (requiring a defendant in a criminal proceeding who asserts the affirmative defense of selective prosecution to show

that (1) "he was singled out for prosecution while others similarly situated have not been prosecuted," and (2) "selection of him for prosecution was invidious or in bad faith and based on intentional, purposeful discrimination stemming from impermissible considerations, such as . the exercise of a constitutionally protected right"). However, even if the defense were available, Respondent has failed to establish its prerequisites.

{13} First, Respondent made no showing that other similarly situated attorneys have not been the subject of disciplinary proceedings, while he has. Second, Respondent's attempt to characterize this disciplinary proceeding as a means to punish him for exercising his right to petition for a grand jury proceeding is a gross distortion of the record. To justify his claim of selective prosecution, Respondent seizes on an isolated statement in a reviewing officer's report prepared before the filing of formal charges against him. *See* Rule 17-104(B) NMRA ("A reviewing officer, upon request of disciplinary counsel or the chair of the board, shall have the authority and duty to review, approve, modify or disapprove dismissals of complaints docketed for formal investigation and offers of informal admonitions proposed by disciplinary counsel."). In that report, after twelve pages detailing why the reviewing officer believed that Respondent committed misrepresentations and the unauthorized practice of law, the report briefly notes the reviewing officer's concern about Respondent's ongoing efforts to petition for the convening of a grand jury to

investigate criminal fraud. Respondent's actions in that regard most concerned the reviewing officer because the reviewing officer thought that Respondent was "trying to carve out a legal role for himself when he does not represent anyone who has any standing to bring these claims." From this single statement, Respondent seeks to portray the entire disciplinary proceeding as flowing from an unlawful intent to deprive him of his constitutional rights. He is simply wrong.

{14} The reviewing officer's report describes in detail the factual basis for his conclusion that Respondent engaged in misrepresentations and the unauthorized practice of law. No fair reading of the reviewing officer's report can lead to the conclusion that Respondent was being singled out for exercising his right to petition the district court to convene a grand jury. Rather, the reviewing officer only noted that Respondent's petitioning activity was merely his latest attempt to press claims that he had unsuccessfully solicited others to pursue through civil litigation. The reviewing officer believed that the claims Respondent was trying to raise through a grand jury proceeding were in violation of Rule 16-301 NMRA, which prohibits the bringing of frivolous claims. However, the reviewing officer specifically recommended against bringing a disciplinary proceeding on this basis, believing that a court of law was the appropriate forum for determining either the merit or the frivolousness of the claims Respondent was trying to pursue by means of a grand jury investigation. In short, there is no basis

for Respondent's claim that he is the victim of selective prosecution.

{15} Respondent also seeks to establish a claim of vindictive prosecution because disciplinary counsel initially recommended dismissing the complaint against him, but then pursued disbarment after the reviewing officer disapproved dismissing the complaint. *Cf. State v. Brule*, 1999-NMSC-026, ¶10, 127 N.M. 368, 981 P.2d 782 (discussing the defense of vindictive prosecution within the context of criminal prosecutions). As with Respondent's claim of selective prosecution, we assume without deciding that the defense of vindictive prosecution may be available to a respondent in an attorney discipline proceeding. Nevertheless, Respondent has failed to establish that vindictive prosecution was at work in
this case.

{16} Respondent's basis for presuming vindictive prosecution is that disciplinary counsel ultimately sought his disbarment after first proposing to dismiss the complaint. However, as touched on above, whenever disciplinary counsel wants to summarily dismiss a complaint, the review and concurrence of a reviewing officer must be obtained. *See* Rule 17-105(B)(3)(a) NMRA (providing that the "dismissal of a complaint that has been docketed for formal investigation is effective only after review and concurrence by a reviewing 6 officer"); Rule 17-104(B) (giving a reviewing officer "the authority and duty to review, approve, modify

or disapprove dismissals of complaints docketed for formal investigation"). Under our Rules Governing Discipline, if a reviewing officer determines that a complaint should not be dismissed, disciplinary counsel has no choice but to pursue the case. Thus, the fact that disciplinary counsel sought the most severe possible sanction does not demonstrate even a prima facie showing of vindictiveness, much less require disciplinary counsel to offer an explanation in rebuttal. *Cf. Brule*, 1999-NMSC-026, ¶ 11 ("By itself, the District Attorney's decision to pursue felony charges in district court after filing a nolle prosequi on the initial misdemeanor charges does not suggest a likelihood of vindictiveness.").

THE CORRECT STANDARD OF PROOF WAS APPLIED IN THIS CASE

{17} Because the hearing committee expressly stated that all of its findings were supported by a preponderance of the evidence, Respondent argues that this Court should impose a higher standard of clear and convincing evidence and dismiss the charges. Though this Court has previously ruled that the preponderance of the evidence standard of proof is to be used for most ethical rule violations, Respondent asks us to reconsider the matter. We decline to do so and reaffirm this Court's long-standing ruling that the preponderance of the evidence standard is the appropriate standard of proof for most alleged ethical rule violations. *See In re D'Angelo*, 105 N.M. 391, 393, 733 P.2d 360, 362 (1986) (per curiam) (discussing the reasons for

applying the preponderance of the evidence standard for most alleged ethical violations in attorney disciplinary proceedings).

{18} Respondent correctly notes that the higher standard of clear and convincing evidence is still applied to ethical rule violations involving fraud. *Id.* at 393, 733 P.2d at 362. In this regard, Respondent points out that he was charged with violating Rule 16-804(C), which prohibits engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." Because the hearing committee found that Respondent committed several violations of Rule 16-804(C) based on a preponderance of the evidence, Respondent argues that those findings cannot stand. We disagree.

{19} While charges of fraud must always be proven by clear and convincing evidence, that higher standard of proof does not always apply to alleged ethical misconduct involving misrepresentations. In an ordinary civil case, allegations of negligent misrepresentation need only be proven by a preponderance of the evidence, while intentional misrepresentations must be proven by clear and convincing evidence. *See, e.g., State ex rel. Conley Lott Nichols Mach. Co. v. Safeco Ins. Co. Of Am.*, 100 N.M. 440, 443, 671 P.2d 1151, 1154 (Ct. App. 1983). However, the negligent/intentional dichotomy used in civil cases does not transfer well into the context of an attorney discipline case. *See In re Bristol*, 2006-NMSC- 041, ¶¶ 11-12, 19, 23, 29, 140 N.M. 317, 142 P.3d 905 (per curiam) (noting that a violation of

Rule 16-804(C) cannot be premised on negligent conduct and ruling that the hearing panel overstepped its reviewing authority by finding contrary to the hearing committee that the attorney engaged in intentional misrepresentations). Instead, when a violation of Rule 16 7 804(C) is premised on conduct that is characterized as a misrepresentation, the conduct must be intentional. That said, not all allegations of intentional misrepresentation must be proven by clear and convincing evidence.

{20} The critical inquiry is whether the attorney's conduct was driven by an improper motive or intent. *See In re Yalkut*, 2008-NMSC-009, ¶25, 143 N.M. 387, 176 P.3d 1119 (per curiam) (providing that an ethical violation premised on the misappropriation of client funds requires a dishonest motive and cannot be based on negligent conduct); *see also In re Obert*, 89 P.3d 1173, 1177-78 (Or. 2004) (en banc) (recognizing that a misrepresentation need not be driven by an improper motive and does not require an intent to commit fraud). Thus, if an attorney is accused of engaging in misrepresentations with fraudulent intent, such allegations must be proven by clear and convincing evidence in the same way that other rule violations involving fraud must be proven. However, if an attorney is accused of engaging in intentional misrepresentations without fraudulent intent, such allegations need only be proven by a preponderance of the evidence, as is the case with most other ethical rule violations. Because the hearing committee expressly found that Respondent did not exhibit a

selfish motive or seek to profit personally from his conduct, we therefore conclude that the allegations that he engaged in misrepresentations in violation of Rule 16-804(C) only needed to be proven by a preponderance of the evidence.

RESPONDENT FAILED TO ESTABLISH THE EXISTENCE OF EX PARTE COMMUNICATIONS, BUT HE IS NOT REQUIRED TO UNDERGO A MENTAL HEALTH EXAMINATION

{21} Respondent contends that he was the victim of ex parte communications between disciplinary counsel and the hearing committee. However, Respondent can point to nothing in the record to support this allegation. Instead, to support his claim, Respondent focuses on the hearing committee's recommendation that he undergo a mental health examination. Respondent contends that there is nothing in the record to support the hearing committee's recommendation, and Respondent therefore speculates that disciplinary counsel must have engaged in ex parte communications with the hearing committee to disparage his mental health. Respondent's speculation finds no support in the record and ignores a statement in the hearing committee's recommendation indicating that it was Respondent's own interactions with the hearing committee that prompted its recommendation that he undergo a mental health examination.

{22} While it was Respondent's behavior before the hearing committee and not ex parte communications that apparently motivated the committee's recommendation for a mental health examination, as we noted after oral argument in this case, both the hearing committee and the hearing panel lacked the authority to condition Respondent's suspension on his submitting to a mental health examination. Although the hearing committee characterized Respondent's behavior as "bizarre and peculiar," the only specific example of this type of behavior cited by the hearing committee was Respondent's failure to obey the chairman's order that Respondent file no further pleadings unless the committee requested that he do so. Respondent's disobedience may have been cause for asking this Court to hold him in contempt, *see* Rule 17-306(D)(1) NMRA, but we conclude that his disobedience is an inadequate basis for ordering a mental health examination, particularly when such a recommended sanction is not explicitly authorized by our Rules Governing Discipline. *See* Rule 17-206 NMRA (listing types of discipline); *see also* Rule 17-208(B) NMRA (permitting the Disciplinary Board to petition the Supreme Court for an order requiring an examination to determine whether an attorney is incapacitated). For that reason, we do not require Respondent to submit to a mental health examination as part of his discipline. That said, we find nothing in the record to support Respondent's claim that ex parte communications played any part in the recommendation that he undergo a mental health examination.

RESPONDENT'S CLAIMS OF PROSECUTORIAL MISCONDUCT ARE UNFOUNDED

{23} Respondent also asserts that the disciplinary proceedings against him should be dismissed because of prosecutorial misconduct that was "pervasive, incessant, and outrageous." To support his argument, Respondent relies on *In re Stein*, 2008-NMSC-013, 143 N.M. 462, 177 P.3d 513 (per curiam). Although we discussed and rejected claims of prosecutorial misconduct in *Stein*, we also questioned the applicability of the criminal law concept of prosecutorial misconduct within the context of an attorney disciplinary proceeding. *Id.* at ¶ 54. We continue to have reservations about the use of this concept outside the criminal law arena. *See Cohen v. State Bd. of Med.*, 676 A.2d 1277, 1280 (Pa. 1996) (finding the criminal concept of prosecutorial misconduct inapplicable to administrative disciplinary proceedings); *see also In re Oxman*, 437 A.2d 1169, 1173 n.11 (Pa. 1981). As in *Stein*, we need not definitively decide its applicability because Respondent has failed to establish the kind of "pervasive, incessant, and outrageous" conduct the concept was intended to remedy. *See State v. Breit*, 1996-NMSC-067, ¶37, 122 N.M. 655, 930 P.2d 792.

{24} For the most part, Respondent's claim of prosecutorial misconduct is based on claims that disciplinary counsel misused the discovery process.

example, Respondent claims that disciplinary counsel concealed potentially exculpatory documents, suborned a false affidavit, misrepresented communications that disciplinary counsel had with Respondent, coached witnesses during discovery, and failed to provide Respondent with copies of subpoenas disciplinary counsel issued for witnesses he planned to call at the hearing. However, Respondent's claims in this regard are based on factual disputes that the hearing committee resolved against him when denying his motions to dismiss. While Respondent also claims that disciplinary counsel misrepresented to the hearing panel the nature of the admonishment disciplinary counsel received in *Stein*, the hearing panel could review our opinion in *Stein* and judge for itself whether disciplinary counsel was being forthright with the committee. Because Respondent's claims of prosecutorial misconduct depend on factual determinations that were resolved against him, we will not substitute our judgment for that of the hearing committee on questions of fact. *See Bristol*, 2006-NMSC-041, ¶15 ("Because the hearing committee directly observes witness testimony, it is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence."). Moreover, other than general assertions of prejudice, Respondent failed to specifically demonstrate how any of disciplinary counsel's purported misconduct prejudiced Respondent's defense or would result in a different outcome if rectified. *See In re Castellano*, 119 N.M. 140, 144,

889 P.2d 175, 179 (1995) (per curiam) (holding that an assertion of prejudice is not a showing of prejudice). For all of the foregoing reasons, we reject Respondent's claim of prosecutorial misconduct.

RESPONDENT RECEIVED ADEQUATE NOTICE OF THE CHARGES

{25} Respondent objects to a number of findings the hearing committee made because they concerned matters that were not set forth in the formal specification of charges. The specification of charges must contain "a brief and plain statement of the charge, or if more than one, each of the separate charges of professional misconduct asserted against the respondent-attorney." *See* Rule 17-309(B)(1) NMRA. Respondent does not deny that the specification of charges included each of the specific rule violations that the hearing committee ultimately found he had committed. Respondent also concedes that the findings to which he objects were not relied upon by the hearing committee for its conclusions that he engaged in misrepresentations and the unauthorized practice of law. As such, Respondent has failed to demonstrate prejudice because he received all the notice to which he was due.

RESPONDENT WAS NOT DEPRIVED OF THE RIGHTS TO DISCOVERY OR TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM

{26} Respondent contends that the hearing committee improperly limited discovery and his right to confront and cross-examine witnesses. To the extent Respondent contends that the hearing committee erred in denying his requests to propound interrogatories, requests for admissions, and requests for the issuance of subpoenas duces tecum, Respondent has failed to explain how he was prejudiced by those limitations. *See Castellano*, 119 N.M. at 144, 889 P.2d at 179. As a result, we will not consider that issue further.

{27} To the extent Respondent contends that the hearing committee improperly restricted the matters into which he could inquire during depositions, we note that throughout these proceedings Respondent sought to uncover what he perceived to be the mishandling of the Harwood probate and the operation of EcoVersity. However, as the hearing committee correctly observed, even if he honestly believed he had valid concerns about the way that the Harwood probate was handled and how that may have impacted EcoVersity's operation, those concerns are not relevant to whether Respondent engaged in misrepresentations or the unauthorized practice of law. Even if Respondent's concerns were valid, a matter on which we express

no opinion, such concerns would not justify violating our Rules of Professional Conduct. Accordingly, we conclude that the hearing committee had good cause to limit the manner in which Respondent could conduct his discovery. *See* Rule 17-311 NMRA ("Upon a showing of good cause, the chair may permit discovery upon such terms as may be appropriate under the circumstances.").

RESPONDENT IS NOT BEING DISCIPLINED FOR NEGLIGENT MISREPRESENTATIONS

{28} Respondent maintains that he is being inappropriately sanctioned for making negligent misrepresentations to both Harbour and the attorney general. Respondent focuses on the hearing committee's findings that he should have known that the statute of limitations had expired on any claims against Harbour as personal representative of the Harwood estate. However, Respondent misconstrues the import of these findings.

{29} Respondent is not being disciplined for misunderstanding the application of the relevant statutes of limitations that may or may not have applied to any claims that could have been brought against the personal representative of the Harwood estate. Instead, as we understand the findings, the hearing committee believed that Respondent knew that the relevant statute of limitations had expired, but that he intentionally misrepresented that the limitations period had not expired in his efforts to intimidate Harbour into relinquishing control of

EcoVersity and to spur the attorney general to initiate an investigation into EcoVersity's operation. As such, the hearing committee recommended discipline for intentional misrepresentations, not negligent ones. Though the hearing committee found that Respondent should have known the state of the law, that finding was coupled with a finding that Respondent had spent a great deal of time reviewing the probate file. In addition, the hearing committee noted that neither Respondent nor any of his purported clients had ever brought a civil action against Harbour. Under these circumstances, the hearing committee's findings only can be viewed as rejecting Respondent's claims of ignorance and mistake. *See Bristol*, 2006-NMSC-041, ¶16 (providing that the hearing committee's findings should be viewed in the light most favorable to its decision). Viewing the hearing committee's findings in that light, Respondent's contention that he is being erroneously sanctioned for making negligent misrepresentations misconstrues the findings made against him.

SUBSTANTIAL EVIDENCE SUPPORTS THE HEARING COMMITTEE'S CONCLUSION THAT RESPONDENT SHOULD BE DISCIPLINED FOR ENGAGING IN MISREPRESENTATIONS AND THE UNAUTHORIZED PRACTICE OF LAW

{30} As noted at the outset, the hearing committee concluded that Respondent violated Rule 16-804(C) by engaging in misrepresentations and Rule 16-505(A) NMRA by engaging in the

unauthorized practice of law. Before proceeding to discuss why we conclude there is substantial evidence to support the hearing committee's decision on those points, we first take note of disciplinary counsel's contention that the hearing committee erred by refusing to also find that Respondent violated two other Rules of Professional Conduct. Disciplinary counsel first notes that although the hearing committee believed that Respondent's conduct demonstrated that he was unfit to practice law, the hearing committee declined to find a violation of Rule 16-804(H) because that portion of the rule had been repealed by the time of the hearing. Disciplinary counsel further notes that while the hearing committee also found that Respondent asserted unfounded claims and contentions against Harbour, the committee declined to find a violation of Rule 16-301 because Respondent did not assert those claims and contentions within a proceeding.

{31} We appreciate disciplinary counsel's position that Respondent should be held accountable for violating an ethical rule that was in effect at the time he committed his misconduct. We also appreciate the need to protect the public from attorneys who pursue unfounded claims. However, we decline to disturb the hearing committee's decision for two reasons.

{32} Regarding the now-repealed provision in Rule 16-804(H), although the hearing committee did indeed find that Respondent demonstrated his lack

of fitness to practice law, that finding was essentially premised on the same conduct that formed the basis for his violations of the other rules for which discipline was recommended. As such, piling on another rule violation that is only a more general means to condemn misconduct that specifically violated other rules would add little to the outcome of this proceeding. In our view, even if we were inclined to hold Respondent accountable for violating the now-repealed Rule 16-804(H), the ultimate sanction we would impose against him would be unchanged. Accordingly, we need not decide whether a sanction should be imposed for misconduct that violated a previously-existing rule which was later repealed before the enforcement proceeding commenced. *Cf. In re Estate of Heeter,* 113 N.M. 691, 695, 831 P.2d 990, 994 (Ct. App. 1992) ("On appeal, error will not be corrected if it will not change the result."). If the question arises in another context that is more compelling, we will revisit the issue at that time.

{33} Disciplinary counsel's desire to hold Respondent accountable for pursuing unfounded claims in violation of Rule 16-301 raises similar concerns for us. Rule 16-301 specifically prohibits bringing frivolous claims in a proceeding. Disciplinary counsel advocates expanding the rule to encompass threats to bring an unfounded claim in a future proceeding. Even assuming that it may be appropriate to expand the application of Rule 16-301 in that way, we decline to do so in this case because

again we foresee no change in the ultimate sanction imposed on Respondent.

{34} We now turn our attention to the rule violations for which the hearing committee and hearing panel did recommend imposing discipline. The hearing committee found three separate violations to Rule 16-804(C) based on Respondent's misrepresentations regarding (1) whether the applicable statute of limitations had expired, (2) whether Respondent actually represented any clients who wanted to sue Harbour, and (3) whether the purported Wilkinson affidavit was inaccurate. The hearing committee found two violations of Rule 16-505(A) based on (1) Respondent's unsuccessful solicitation of Harwood's sister as a client, and (2) his assertion to Harbour that the statute of limitations had not yet run on claims Respondent threatened to bring against Harbour for breach of his fiduciary duty as personal representative of the Harwood estate. Notwithstanding Respondent's arguments to the contrary, for the reasons that follow, we determine that the hearing committee's findings are supported by substantial evidence. *See Bristol*, 2006-NMSC-041, ¶¶ 16-18 (providing that the findings of the hearing committee are reviewed for substantial evidence).

{35} As we discussed earlier in this Opinion, the hearing committee found that Respondent engaged in intentional misrepresentations, but that he did so without a selfish motive. Regarding the hearing committee's conclusion that Respondent

violated Rule 16-804(C) during his meeting with Harbour, the committee could reasonably view the evidence as establishing that Respondent knew that the statute of limitations had expired, but intentionally misled Harbour into believing it had not in an effort to persuade him to relinquish control of EcoVersity. *See Bristol*, 2006-NMSC-041, ¶16 (noting that all reason able inferences from the evidence are made in support of the decision of the hearing committee). Similarly, Respondent's same misrepresentations to the attorney general could be reasonably viewed as intended to spur an investigation into EcoVersity's operation.

{36} We recognize that Respondent contends his statements to Harbour were based on a misunderstanding of the law. However, we again note that the hearing committee specifically found that Respondent thoroughly reviewed the probate file before meeting with Harbour and sending his letter to the attorney general. also again note [*sic*] the hearing committee's finding that neither Respondent nor any of his purported clients ever brought a civil action against Harbour. As such, the hearing committee could reasonably reject Respondent's claim of ignorance regarding the true state of the law and instead could reasonably infer that Respondent knew the statute of limitations had expired but engaged in misrepresentations to achieve his goals without pursuing civil litigation that he knew would be time-barred. We will not second-guess the hearing committee on such fact-intensive questions of credibility and motive. *See*

Bristol, 2006-NMSC-041, ¶15 (requiring deference to the hearing committee on matters of weight and credibility).

{37} Regarding Respondent's statements to Harbour indicating he represented clients with standing and interest to reopen the Harwood estate and sue Harbour, we conclude that there was substantial evidence to support the hearing committee's conclusion that Respondent violated Rule 16-804(C). We recognize that Respondent claimed he was in the midst of ongoing discussions with Harwood's sister and others regarding whether they wanted Respondent to represent them in a lawsuit. However, the hearing committee was free to reject the evidence Respondent offered in support of his claim. *See Bristol*, 2006-NMSC-041, ¶¶15, 26. In this regard, we note the hearing committee's finding that Harwood's sister refused to sign the attorney representation agreement that Respondent sent to her well before he met with Harbour. We also again take note of the hearing committee's finding that Respondent never filed any type of civil action against Harbour on behalf of anyone. In short, because Respondent failed to establish the existence of any attorney-client relationship, the hearing committee could reasonably infer that he simply misrepresented the existence of clients in his effort to intimidate Harbour into relinquishing control of EcoVersity. *Id.* ¶¶ 6, 17.

{38} As for the purported affidavit claiming to memorialize a series of conversations between

Respondent and Wilkinson, we conclude that there was substantial evidence to support the hearing committee's conclusion that the purported affidavit violated Rule 16- 804(C). In attempting to rebut any suggestion that the affidavit was intended to be a misrepresentation, Respondent relies heavily on the fact that he disclosed in his letter to the attorney general that the purported affidavit had not been signed or reviewed by Wilkinson. Aside from that disclosure, he nevertheless represented to the attorney general that it accurately summarized Wilkinson's statements to Respondent during several conversations between them and repeatedly cited the purported affidavit in support of the factual allegations he made in his letter. Wilkinson denied the accuracy of most of what was set forth in the purported affidavit and was not aware that Respondent was considering submitting such a document to the attorney general. Under these circumstances, the hearing committee could reasonably infer that Respondent intended to mislead the attorney general into believing that the purported affidavit was an accurate, albeit unsigned and unreviewed, statement of Wilkinson's belief. *See Bristol*, 2006-NMSC-041, ¶¶16, 17.

{39} Regarding the hearing committee's conclusion that Respondent engaged in the unauthorized practice of law in violation of Rule 16-505(A), Respondent does not dispute that he solicited Harwood's sister to retain him to pursue a lawsuit against Harbour, nor does he dispute that he advised Harbour that the statute of limitations had not

expired for claims against him as the personal representative of the Harwood estate. Moreover, Respondent does not question whether his conduct constitutes the practice of law. Instead, Respondent contends that his attempts to solicit a client and give legal advice were exempt from disciplinary sanctions because he was actually permitted to take those actions under exceptions set forth in Rule 16-505(E), which Respondent characterizes as "safe harbors" from the general prohibition against the unauthorized practice of law. For the reasons that follow, we conclude that the hearing committee was entitled to reject Respondent's asserted defenses.

{40} While Rule 16-505(A) prohibits the unauthorized practice of law by attorneys who are not licensed in New Mexico, the rule as a whole does provide some limited exceptions for attorneys who are admitted to practice in another state. Respondent seeks to claim two of those exceptions. *See* Rule 16-505(E)(1) & (2) (permitting a lawyer admitted in another state and not suspended from practice to provide legal services in New Mexico on a temporary basis if the lawyer associates with local counsel who actively participates in the matter or if the lawyer reasonably expects to be authorized to practice in this state). However, at the time that Respondent solicited Harwood's sister to be a client, Respondent was still on inactive status in Virginia. Even though he anticipated being returned to active status, he was still inactive. As such, we conclude that Respondent could not rely on the exceptions to the prohibition against the unauthorized practice of

law. *See* Rule 16-505 cmt. 7 (noting that an attorney on inactive status is not considered admitted for purposes of the exceptions permitting temporary legal services). Perhaps if Respondent had already been on active status in Virginia, the securing of local co-counsel or his anticipated admission to the New Mexico bar would have permitted his actions. The record also reflects that Respondent had not secured local counsel. Although he spoke with a local attorney about a possible future lawsuit, at the time he did so, local counsel whom he had contacted understood that he did not yet have a client.

{41} We recognize that by the time he met with Harbour, Respondent had apparently just learned that his Virginia license had been reactivated and that he had passed the New Mexico bar exam. However, Respondent's reliance on his newly-reactivated Virginia license coupled with his expectation that he would soon be admitted to the New Mexico bar strains the exceptions in Rule 16-505(E) to their breaking point. Moving from inactive to active status to practice law is not simply an empty formality, nor is the initial admission to practice law. If those formalities are to have any meaning, a lawyer must refrain from practicing law until he or she is clearly authorized to do so. We therefore conclude that substantial evidence supported the hearing committee's conclusion that Respondent engaged in the unauthorized practice of law.

A DEFERRED PERIOD OF SUSPENSION IS THE APPROPRIATE DISCIPLINARY SANCTION UNDER THE CIRCUMSTANCES OF THIS CASE

{42} As noted above, although the hearing committee recommended that Respondent undergo an indefinite suspension until he submitted to a mental health examination, the hearing panel disagreed with that recommendation and instead recommended a one-year suspension during which Respondent would submit to a mental health examination and counseling, if recommended, followed by a six-month probationary period. The disagreement between the hearing committee and the hearing panel notwithstanding, we independently determine the appropriate level of sanction to impose for Respondent's misconduct. *See Bristol*, 2006-NMSC-041, ¶¶18, 30. In so doing, the *ABA Standards for Imposing Lawyer Sanctions* (1992) provide us with guidance. *See In re Key*, 2005-NMSC- 014, ¶ 5, 137 N.M. 517, 113 P.3d 340.

{43} Because Respondent engaged in conduct involving intentional misrepresentations and the unauthorized practice of law, Standards 5.1 and 7.0 of the *ABA Standards* provide the most direct guidance for this case. Standard 5.1 provides guidance for imposing sanctions for failure to maintain personal integrity, and, specific to this case, conduct involving dishonesty, fraud, deceit, or misrepresentation directed at someone other than a client or tribunal. Under Standard 5.13, a reprimand

is generally considered appropriate when a lawyer knowingly engages in non-criminal conduct involving dishonesty, fraud, deceit, or misrepresentation that adversely reflects on his or her fitness to practice law.

{44} Regarding the unauthorized practice of law, Standard 7.2 provides that a suspension is generally considered appropriate when the lawyer knowingly engages in such conduct and causes injury or potential injury to a client, the public, or the legal system. In contrast, if the attorney negligently engages in the unauthorized practice of law but causes little or no actual or potential injury, then a reprimand or admonition is generally considered appropriate. *See* Standards 7.3 and 7.4.

{45} Based on the foregoing standards, we hold that a reprimand and suspension are the most appropriate response for the totality of Respondent's misconduct. We note, however, that Standard 9.0 contemplates increasing or decreasing a sanction's severity based on any aggravating or mitigating circumstances in the case. As we have previously noted, the hearing committee found that Respondent acted without a selfish motive, which is a potential mitigating factor under Standard 9.32(b). However, the hearing committee also found that Respondent "has a total lack of understanding of his conduct and the consequences of his actions," a finding with which we agree and which has ample support in the record. *See* Standard 9.22(g) (providing that an

aggravating circumstance includes a lawyer's refusal to acknowledge the wrongful nature of his conduct).

{46} We note that while the hearing committee declined to find a pattern of misconduct as an aggravating circumstance in this case because Respondent's misconduct had a single purpose, disciplinary counsel nevertheless asks that we consider Respondent's repeated misrepresentations as a pattern of conduct constituting an aggravating factor under Standard 9.22(c). Without foreclosing the possibility that a pattern of conduct could be found to exist where an attorney engages in repeated misconduct for a single purpose, we decline to overturn the hearing committee's decision on this point based on the unique circumstances of this case.

CONCLUSION

{47} In sum, because there are factors both in aggravation and in mitigation of Respondent's offenses, and because Respondent's offenses otherwise warrant a reprimand and suspension under the *ABA Standards* cited above, a one-year suspension and public reprimand by means of this Opinion are the appropriate sanction for Respondent's misconduct. We note, however, that the misconduct at issue in this case took place shortly before and after Respondent was admitted to practice law in this state. Accordingly, we deem it appropriate to exercise our discretion to defer the period of suspension on the condition that Respondent engage in no further ethical misconduct

in violation of our Rules of Professional Conduct and Rules Governing Discipline. We recognize that disciplinary counsel continues to believe that disbarment is the appropriate sanction in this case. However, without minimizing the seriousness of Respondent's misconduct, we cannot agree that disbarment would be an appropriate response at this time.

{48} As noted before, although Respondent appears to be unwilling or unable to understand the nature of his misconduct, there is no indication that he was acting with a selfish motive or desire to secure a private benefit for himself. Because all of Respondent's misconduct centered around his single-minded purpose of righting what he perceived to be a wrong committed against EcoVersity, we hope that Respondent's penchant for misrepresenting facts to suit his purposes and stretching the interpretation of our ethical rules to their breaking point will not repeat itself in other contexts. Therefore, as previously ordered by this Court, Respondent's one-year suspension from the practice of law is deferred. However, if Respondent fails to engage in meaningful self-examination and continues to engage in unethical conduct in another context, we will not hesitate to revisit the need for a more severe sanction to protect both the public and our legal system.

{49} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

APPENDIX GG

Title 37, Article 1, Section 1 of the New Mexico Statutes Annotated (NMSA 37-1-1 (1978)) states:

The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided.

Title 37, Article 1, Section 4 of the New Mexico Statutes Annotated (NMSA 37-1-4 (1978)) states:

Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four years.

Title 37, Article 1, section 7 of the New Mexico Statutes Annotated (NMSA 37-1-7 (1978)) states:

In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved.

APPENDIX HH

Title 57, Article 22, section 9 of the New Mexico Statutes Annotated (NMSA 57-22-9 (1978)) states:

Authority of the attorney general:

A. The attorney general may, on behalf of the state, examine and investigate any charitable organization subject to the Charitable Solicitations Act [Chapter 57, Article 22 NMSA 1978] to ascertain the conditions of its affairs and to what extent, if at all, it fails to comply with the trusts that it has assumed or if it has departed from the purposes for which it was formed. In the case of failure or departure, the attorney general may institute, in the name of the state, a proceeding necessary to correct the noncompliance or departure by any remedy available under the common law.

B. The attorney general may, in the name of the state, seek injunctive relief, civil penalties, financial accounting or restitution from any person who has failed to comply with the registration, filing or disclosure provisions of the Charitable Solicitations Act or who has otherwise violated the provisions of that act.

APPENDIX II

New Mexico Uniform Jury Instructions – Civil 13-1633 (1978), Fraud, states:

A party is liable for damages proximately caused by [his] [her] fraudulent misrepresentation. To prove fraud, _____ (party claiming fraud) must prove:

First, a representation of fact was made which was not true;

Second, either the falsity of the representation was known to the party making it or the representation was recklessly made;

Third, the representation was made with the intent to deceive and to induce _____ (party claiming fraud) to rely on the representation; and

Fourth, _____ (party claiming fraud) did in fact rely on the representation.

Each of these elements must be proved by clear and convincing evidence.

USE NOTE

This instruction is to be used only in cases where the claim is for fraudulent misrepresentation. See UJI 13-1632 for cases where negligent misrepresentation claims are made.

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Supreme Court, U.S.
FILED
JUL 2 8 2010
OFFICE OF THE CLERK

No. 09-1553

IN THE

SUPREME COURT OF THE UNITED STATES

CLAUDE DAVID CONVISSER,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pro Se

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Petitioner Claude D. Convisser ("Mr. Convisser") respectfully states as his reply to the opposition to his petition for writ of *certiorari* ("Petition") as follows:

REPLY ARGUMENT

The brief in opposition filed by deputy disciplinary counsel Joel L. Widman ("Mr. Widman") for the New Mexico Supreme Court breaches Mr. Widman's "obligation to the Court to point out ... any perceived misstatement [of fact or law] made in the [P]etition." Rule 15(2), Rules of the Supreme Court of the United States.

The brief in opposition cites to little record evidence to support its argument for denial of the Petition. Despite Mr. Widman's complaint that the Petition's "half-truths, misrepresentations and the utilization of matters out of context" force him "to spend time and space correcting the matters presented instead of dealing with the case on its merits,"[1] it is apparent that he spent scant time and barely seven pages of space addressing either Mr. Convisser's alleged mis-statements or the merits. Instead, Mr. Widman relies on slur and innuendo on the assumption that this Court will defer to the lower court without examining the compelling constitutional and public policy reasons to grant Mr. Convisser's Petition. In light of the New Mexico Supreme Court's issuance of an opinion in this case on July 13, 2010, Mr. Widman is, therefore, estopped in any supplemental brief from addressing points of fact and law to which

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[1]Brief in opposition, at 1.

he failed to object with specificity in his brief in opposition. *See* Supplemental Brief Supporting Petition for Writ of Certiorari, filed herewith.

Notably, the brief in opposition does not dispute that Mr. Convisser raised all federal constitutional questions presented below. Thus, this Court has probable cause for jurisdiction over the Petition.

I Three Sets of Disciplinary Officials Furnished Direct Evidence That the Discipline Was Because of Mr. Convisser's Petitioning

In the opening sentence of the brief in opposition, Mr. Widman charges that Mr. Convisser's claim that the New Mexico Supreme Court imposed discipline for his First Amendment petitioning "is not true[,] has no basis in fact[, and] is an outright falsehood." Brief in opposition, at i. In fact, Mr. Widman himself argued to the disciplinary board panel that Mr. Convisser's petitioning was "certainly not the conduct we want to see in somebody admitted to practice law in New Mexico." App. 107a. The hearing committee recommended that Mr. Convisser's future practice of law, if any, be conditioned on his not assisting others to exercise their First Amendment right to petition. App. 23a (¶ 39(B)). The hearing committee knew from hearing testimony that the Rescue EcoVersity petition was the only legal action Mr. Convisser was then involved in concerning the target of the petition, complaining witness Harbour.

The reviewing officer, whose lead Mr. Widman and the hearing committee followed, overruled Mr. Widman's proposed dismissal of all allegations of misconduct against Mr. Convisser and cited "Mr. Convisser's repeated attempts to have a grand jury summoned to investigate criminal fraud" as the thing that, "more than anything else, bothers [her] about the entire file." App. 43a. While the reviewing officer also believed that Mr. Convisser's petitioning, the only form of grand jury summoning he had done, "smack[ed] of [his] trying to carve out a legal role for himself," App. 43a, she did not recommend any disciplinary charge for improper solicitation of clients, despite the obligation under Rule 17-309(B)(2) New Mexico Rules Annotated ("NMRA") (App. 82a) to include all ethical violations in the specification of charges. Thus, her true and sole objection was to his petitioning.

II After Proposing to Dismiss, Disciplinary Counsel Sought to Punish Mr. Convisser With Disbarment For His Petitioning Because Disciplinary Officials Directed Counsel To Do So

The "credible reason why [Mr. Widman] would want to punish [Mr. Convisser] for his petitioning" after proposing dismissal, brief in opposition, at 1, is that Rule 17-104(B) NMRA (App. 80a) required Mr. Widman to abide by the reviewing officer's veto of his proposed dismissal and thus, to file charges based on the reviewing officer's opinions. The hearing committee fortified the impetus for Mr. Widman to pursue Mr. Convisser for his petitioning in its adoption of the reviewing officer's prejudice against Mr.

Convisser's petitioning. Hearing committee recommendation, ¶ 39(B) (App. 23a). Mr. Widman's argument to the disciplinary board panel that Mr. Convisser's petitioning was "certainly not the conduct we want to see in somebody admitted to practice law in New Mexico," App. 107a, expressed in stark terms the unconstitutional, discriminatory motivation originating from his disciplinary superiors. In turn, the recommendations by the hearing committee and disciplinary board panel for Mr. Convisser's suspension, probation, and a mental evaluation followed directly on Mr. Widman's requests for Mr. Convisser's disbarment. This was vindictive.

III The Brief in Opposition Fails to Refute Any of Mr. Convisser's Challenges to Procedural Due Process

Mr. Widman points out that Mr. Convisser did not provide extensive factual detail supporting his proposition that the findings were in fact not supported by substantial evidence in the record. Brief in opposition, at 6. This argument misses Mr. Convisser's point of law that the New Mexico Supreme Court's unquestioning application of the very standard of appellate review by substantial evidence in the face of direct evidence that unconstitutional intent infected the hearing committee's findings of fact and their adoption by the disciplinary board panel constituted a denial of due process, especially when that Court reviewed findings made by the lowly and, in the lawyer disciplinary context, abnormal standard of proof by preponderance of the evidence. Mr. Convisser's inability to show with extensive factual detail that the

findings are not supported by substantial evidence was due to space limitations in the Petition and to the myriad legal issues he had to address therein.

Evidence that *ex parte* communications influenced the recommendation for a mental health evaluation and ultimately, the matters before New Mexico Supreme Court's lies in complaining witness Harbour's testimony that he had *ex parte* communications on the phone with the hearing committee chair, (tab 88, exhibit 4);[2] Mr. Convisser's testimony that Mr. Harbour has been spreading retaliatory, malicious rumors about him in Santa Fe (tab 87, ¶ 6), disciplinary board panel member Carolyn Tinker's statement that that panel had received communications implicating Mr. Convisser in having "mood swings like crazy" (App. 108a); and Mr. Widman's non-privileged, defamatory statements, overheard by Dr. Janeen Maas, to the effect that Mr. Convisser is schizophrenic and delusional, published on the very day and in the very place that Mr. Widman denied to the New Mexico Supreme Court having made such statements to the two panels below it.

In response to Mr. Convisser's argument that he was not provided advance notice of certain of the ethical allegations against him and thus, was denied an opportunity to offer a defense to them at the hearing, Mr. Widman asserts that the findings do not expressly identify any other of the New Mexico Rules

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[2] References to tab numbers are to docket entries appearing in the disciplinary board pleading index. App. 55a-61a.

of Professional Conduct than those stated in the specification of charges. However, since at disciplinary counsel's post-hearing request, the hearing committee included factual detail comprising violations of uncharged Rules in paragraphs 6 (incompetence), 17 (extortion), 19 (misrepresentation to disciplinary counsel), and 23 (failure to report another attorney's misconduct) of its findings (App. 12a-18a), the hearing committee considered this detail to be relevant. Since the New Mexico Supreme Court adopted the hearing committee's findings, including descriptions of the infractions of which Mr. Convisser never received notice, Mr. Convisser suffered actual prejudice by this tactic. It was Mr. Convisser's post-hearing motion to strike Mr. Widman's inclusion of this material in his proposed findings that gave rise to the hearing committee's branding Mr. Convisser's behavior as "bizarre and peculiar," based on an email exchange that is not in the record and whose contents, furthermore, are in fact misrepresented in paragraph 36 of the findings. App. 22a.

Mr. Widman's assurance that Mr. Convisser "inspected whatever documents were contained in disciplinary counsel's file," brief in opposition, at 7, misses the point that there is compelling evidence that Mr. Widman removed some potentially exculpatory documents from the file before he allowed Mr. Convisser access. Rather than stating simply that he allowed Mr. Convisser to inspect "all documents in the file," Mr. Widman, by the phraseology quoted above, begs the question of whether he had already secreted documents from the file by the time he allowed Mr. Convisser to view it. This prosecutorial misconduct

would be in keeping with the admonishment Mr. Widman received in *In the Matter of Stein* for having hidden documents from that attorney-respondent. 177 P.3d 513, 525 (N.M. 2008). Although as Mr. Widman notes, Mr. Convisser was allowed to conduct some depositions, the protective order entered over Mr. Convisser's objection severely constrained their scope and prevented him from impeaching witnesses and offering a worthy defense at the hearing.

CONCLUSION

The conclusion of the brief in opposition, at 7-8, is false: that "[t]here is simply no basis in the record for arguing, much less concluding, that petitioner was prosecuted for exercising his First Amendment rights or that he was denied due process or equal protection of the law." To the contrary, there is strong reason to believe the opposite, answer all of Mr. Convisser's questions presented in the affirmative, and grant his Petition.

Respectfully submitted,

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